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# The Criminal Law Review

## 1956

EDITORS

**JOHN BURKE**

and

**PETER ALLSOP, M.A.**

*Barristers-at-Law*

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LONDON
SWEET & MAXWELL LIMITED
2 & 3 CHANCERY LANE
1956

AUSTRALIA
The Law Book Co. of Australasia Pty Ltd.
Sydney : Melbourne : Brisbane

CANADA AND U.S.A.
The Carswell Company Ltd.
Toronto

INDIA
N. M. Tripathi Private Ltd.
Bombay

NEW ZEALAND
Legal Publications Ltd.
Wellington

PAKISTAN
Pakistan Law House
Karachi

*Printed in Great Britain*
*by*
THE EASTERN PRESS LIMITED
LONDON AND READING

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# CRIMINAL LAW

## THE GENERAL PART

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# THE CRIMINAL LAW REVIEW

*Editors*

JOHN BURKE and PETER ALLSOP, M.A.

*Barristers-at-Law*

## *Editorial*

**1956**

On January 1, 1954, the first issue of this *Review* was published with the purpose of putting into the hands of all those interested in the practice and administration of the criminal law a monthly periodical covering every aspect of the subject. In the two years that have gone by since then we have seen interest in this *Review* increase throughout the world and we have been encouraged by support for the *Review* and for the policy it has followed.

In September, 1955, we commenced the feature "Summary Justice"; this contains much of interest and entertainment and from the contributions which we have received from many parts of the country we feel confident in establishing it as a regular item. We ask our readers to bear it in mind and to send us cuttings of interesting cases.

For the coming year we intend to continue our present policy and we are always willing to consider suggestions for improvement. In response to requests we again publish the Calendar at the front of the issue and we have returned to our original practice of including the dates of Quarter Sessions for the current and next month. Many readers have found the list of articles published under Books and Periodicals of use but we have been at pains to improve it further and we now publish a "Reader's Digest" which states briefly the subject of the most important articles of the month contained in other periodicals.

Last year we asked for more notes of cases raising points of law and procedure decided in magistrates' courts and we should like to thank all those who have sent in notes and reports for their co-operation. We hope that readers will continue to bear our request in mind and send us suitable reports.

### Cases at Assizes and Quarter Sessions

We publish at page 52 a report of the case of *R.* v. *George,* heard at Lincoln Assizes before Streatfeild J., who gave a ruling on when an assault became indecent, and at page 53 a report of *R.* v. *Delgarno*, a case from Bedfordshire Quarter Sessions on section 2 of the Administration of Justice (Miscellaneous Provisions) Act, 1933. There must be, we believe, a number of instances occurring at Assizes and Quarter Sessions when the court is required to give a ruling which involves a point of law, evidence or practice. Some of these may well be worth preserving and we therefore invite counsel who have been present in court to send a note to the Editors of this *Review* so that a record may be made of the point for the benefit of others.

### Old Bailey Chronicle

During the last two sessions of 1955 the Old Bailey maintained its reputation for sensational trials but, for once, the most notable involved neither sex nor murder.

The abortive trial of Comer and Dimes in September resulted in two further trials both of which took place before Ormerod J. Three men and Mrs. Comer were found guilty of conspiring to pervert the course of justice by paying a senile clergyman to give perjured evidence. As a postscript to this trial the Lord Chief Justice had to draw the attention of the B.B.C. to the provisions of the Criminal Justice Act, 1925, which prohibit the taking of photographs in the precincts of a court, because of a picture shown on B.B.C. television. The other trial arising out of the Comer case was *R.* v. *Glinski,* in which the accused was acquitted of committing perjury. There the judge said that he could not emphasise too strongly that either the two police officers were speaking the truth or it was a most deliberate lie on their part to manufacture a case against the accused.

#### *Tax prosecutions*

On December 6 two men pleaded guilty before the Lord Chief Justice to tax frauds totalling nearly £30,000. Adopting the unusual course of fining the accused, the Lord Chief Justice stated that he had done this because of the considerable delay, two years, in prosecuting the men. He said: "Speaking with a full sense of responsibility as head of the criminal law in this country, I say that that conduct amounts to cruelty to you and to those who are near and dear to you. You are kept in suspense during the whole of this time . . . and I cannot think that that is proper conduct for a Government Department." The Inland Revenue Commissioners have agreed that proceedings could have been started earlier.[1]

### Criminal Law in Northern Ireland

The criminal law in Northern Ireland has developed in its own way and not always on lines parallel with English development. In some ways it will seem to English readers to be more advanced and in others more backward. Dr. Llewellyn Edwards, Reader in Law in the Queen's University, Belfast, will deal with the interesting differences in a series of articles to be published this year. In his first article on page 7 Dr. Edwards critically considers the use of special powers considered to be necessary because of the political situation in Northern Ireland.

### A murderer may not profit from his crime

In the Chancery Division on November 2, 1955, Wynn-Parry J. wrote a postscript to the case of Chesney, alias Merrett, in the case of *Re Merrett's Settlement Trusts.* Merrett (or Chesney) was, in 1927, charged with murdering his mother and a verdict of " Not Proven " was returned by a majority of the jury in Edinburgh (see [1954] Crim.L.R. 500). In March, 1954, a coroner's jury sitting in Middlesex found him guilty of the murder of his wife and mother-in-law some weeks earlier, but he had by then committed suicide in Germany. Wynn-Parry J. had to decide upon the destination of the property settled by Merrett. He held that since the settlor could not take any benefit which arose to him as a result of his felonious slaying of another person, in this case Merrett's wife, the trusts in favour of Merrett should be struck out. In the result the whole trust property went to the Crown as *bona vacantia.*

### A magistrates' clerk protests

Sympathy will be felt for the magistrates' clerk who carried his protest against unlawful parking to the point of being fined by his own magistrates. Mr. Ian M. Hezlett, the clerk to the Windsor magistrates, placed his car on a no-parking sign painted on the road to bring to the notice of the authorities the fact that omnibuses were being unlawfully parked near there. The clerk, who pleaded guilty, was fined a total of £3 on three summonses for causing obstruction with his car.

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[1] H.C. Debates, Vol. 547, col. *143*; December 12, 1955.

The Chairman of the magistrates (Mr. J. Gaymer Jones) said that his colleagues had asked him to say that they thought that Mr. Hezlett might have adopted some other method of bringing the matter of the omnibuses to the notice of authority, but they found that the area was not an authorised omnibus stand. It is of interest to note that an application by the prosecution for costs against Mr. Hezlett was refused.

### Committals to Assizes and Quarter Sessions

We included in the Editorial in November last year a note concerning committals to assizes and quarter sessions. We print on page 67 a letter pointing out an omission made by our correspondent.

### Juvenile delinquency

The Seventh Report on the Work of the Children's Department, published by the Home Office on November 16, 1955 [6s.], deals with juvenile delinquency and juvenile courts, approved schools and remand homes. There has been a rapid decline in juvenile delinquency since the last report of the Children's Department was issued in 1951, the causes of which are not known although they may be attributed to a number of factors, such as the passing into a higher age group of those whose childhood was disturbed by war and evacuation, improvements in housing and other social services and full employment.

### Road traffic offences

The Return of Offences Relating to Motor Vehicles for 1954, published on November 16, 1955, shows a total of 608,640 offences and alleged offences, which is the highest figure ever recorded. The most frequent types of offence were obstruction of highways and roads (89,750) and exceeding the speed limit in built-up areas (70,991).

### Parliament

Among the Private Members' Bills introduced in the Commons on November 9, 1955, were the Small Lotteries and Gaming Bill, which is intended to authorise the conduct of small lotteries for other than private gain by societies raising money for charitable, sporting and other purposes and to amend the law as to gaming; the Justices of the Peace Act, 1361 (Amendment) Bill; the Litter Bill, which proposes to prescribe penalties for the deposit of litter; and the Obscene Publications Bill, which amends and consolidates the law relating to obscene publications (H.C. Debates, Vol. 545, col. 1857; November 9, 1955).

On November 15, Mr. Silverman introduced a Bill to abolish or to suspend for a period the passing and execution of the death sentence on conviction of murder and to substitute an alternative punishment. The Government has since intimated that it is prepared to consider providing time for a general debate on the abolition of the death penalty and hopes to do so very soon on Parliament's reassembly after Christmas; it is not prepared however to give time for a second reading of Mr. Silverman's Bill (Vol. 546, cols. 207, 1659; November 15, 24, 1955).

The Prime Minister has refused to appoint a select committee to consider the advisability of abolishing the death penalty (Vol. 547, col. *86*; December 8, 1955).

### *Questions to the Home Office*

On December 1, 1955, the Home Secretary faced a barrage of questions ranging from auctions via capital punishment to Sunday entertainments. There were a dozen suggestions for legislation to which negative replies were given in a similarly wide variety of forms. These ranged from "No, Sir" to the more optimistic "I cannot at present say. . . ." Perhaps the most regrettable negative was to a question on the report on the summary trial of minor offences. Despite the facts that a unanimous report with which the Home Secretary agrees was presented on July 15, 1955, that its adoption would save many hours of policemen's time and that the Committee recommended introduction of the new procedure "without delay as a matter of urgency" the Home Office are still considering the amendments of the law necessary. These were pointed out by the Committee (see Vol. 546, col. 2509).

### *Police notices*

The Home Secretary has given details of the types of notices put up by the Metropolitan Police restricting the parking of motor-vehicles in the Metropolitan area (Vol. 545, col. *200*; November 9, 1955).

### *Prisons*

Twice during November, 1955, the treatment of prisoners was discussed on the motion for adjournment. On November 21, the Commons discussed one prisoner's alleged ill-treatment by warders on May 24, 1952, and Sir Hugh Lucas-Tooth explained the circumstances which give rise to the complaint. On November 30 the

Commons considered the stopping by the prison governor of a letter written by a person remanded in prison awaiting trial to his Member of Parliament; the authority of the governor to do so was not questioned, but it was doubted whether he had exercised his discretion rightly. Sir Hugh Lucas-Tooth explained the principles on which the censorship of prisoner's letters is conducted and said that he was satisfied that in the present case the governor had acted rightly. The Home Secretary on the next day placed before the House the instructions given to prison officers to restrict or censor prisoners' mail (Vol. 546, cols. 1223 *et seq.*, 2481 *et seq.*, 2515).

The Home Secretary has also given details concerning the remuneration paid to prisoners. In their first eight weeks all prisoners may earn 10d. per week. After that flat-rate workers earn an average of 2s. 6d. with a maximum of 4s., while piece-rate workers have no maximum, but average about 2s. 9d. Preventive detention prisoners in central prisons earn a 50 per cent. bonus on these rates (Vol. 546, col. *231*; December 1, 1955).

### *Detention centres*

A second junior detention centre, for boys not less than fourteen and under seventeen years, at Foston Hall, Derbyshire, is nearly ready for occupation and is expected to be open at the latest early this year. Buildings for a second senior centre, for boys between seventeen and twenty-one, are being adapted at Werrington, Staffordshire, and it is hoped that it will be opened towards the end of the year.

Some doubt was expressed in the Commons as to the suitability of persons being sent to the present centres, conscientious objectors being mentioned particularly. The Home Secretary reminded the House that whether or not a person should be sent to a detention centre was for the magistrates to decide. He gave an assurance that proper care is taken to ensure that boys are medically fit for the training given at the centres (Vol. 546, cols. *54*, 2513, *235*; November 17, December 1).

### Judicial appointments

Mr. George Stanley Waller, O.B.E., Q.C., has been appointed Recorder of the City of Bradford, Mr. Rudolph Lyons, Q.C., Recorder of the Borough of Sunderland, Mr. John Frederick Drabble, Q.C., Recorder of the Borough of Huddersfield, Mr. Peter Stanley Price, Recorder of the City of York, Mr. John Brooke Willis, Recorder of the Borough of Rotheram, and Mr. Reginald Withers Payne, Recorder of the Borough of Pontefract.

# Special Powers in Northern Ireland

By J. Ll. J. Edwards

*Reader in Law in the Queen's University, Belfast*

## *The political background and the absence of an extradition treaty with Eire*

Since its emergence as a separate political entity in 1921, Northern Ireland has been beset with periodic outbursts of deliberate violence aimed at ending Partition and establishing a united Ireland. During the past two years, after a period of comparative tranquillity, small bands of the Irish Republican Army have carried out a series of armed raids on British Army barracks in various parts of the Province and, more recently, their activities have been extended to military establishments in Great Britain. The latest outrage, the work of another militant organisation called the Saor Uladh or Ulster Republican Army (a body having no affiliation with the I.R.A.) was directed against the Rosslea barracks of the Royal Ulster Constabulary. To meet these and other violent manifestations of nationalism the Government of Northern Ireland, throughout the nearly twenty-five years of its existence, has continued in force certain legislative measures which bear distinct signs of identification with the exceptional powers operative in those parts of the Commonwealth where a state of emergency at present exists. Whether it is in Kenya, Malaya or in Cyprus that the maintenance of law and order is called in question, criticism is often ventilated against the widespread creation in these countries of new offences or the allegedly harsh penalties attached thereto, the vast extension of the powers of search and arrest accorded to the police and to the military forces, and the abrogation of generally recognised safeguards in relation to evidence and procedure at criminal trials. It seems particularly apposite, therefore, to examine the special powers exercisable at the present day by the Government of Northern Ireland in what, compared with the 1920s and 1930s, can justifiably be described as conditions of political stability. Is there any justification for the parallel drawn between the firmly entrenched law operating in Northern Ireland and the emergency measures introduced in other parts of the Commonwealth?

When in 1922 the first Civil Authorities (Special Powers) Act was passed by the Northern Ireland Parliament the situation called for exceptional measures. It is estimated that in that year alone, in the course of what are euphemistically described as "the troubles," over 230 people were killed and property amounting to £3,000,000 was destroyed. Faced with the alternatives of allowing the authority of the newly created Government to be undermined by open acts of violence, or introducing repressive legislation in order to re-establish and maintain public order, the Provincial Parliament gave its blessing to the drastic piece of legislation generally known as the Special Powers Act.[1] At the time of its enactment it was clearly intended as an emergency measure, for it was provided that the new Act was to continue "in force for one year and no longer unless Parliament otherwise determines." In fact, it was renewed every year till 1933 when it was decided that "the Act of 1922 shall continue in force until Parliament otherwise determines." Although the regulations made under the 1922 Act have changed considerably during the intervening years, the present policy being one of hopefulness that it will not be necessary to enlarge the Government's powers, there are no signs at present of any intention even to reconsider repealing the original statute.

One of the strongest factors determining the attitude of the Northern Ireland Government is the absence of an extradition treaty between the United Kingdom and Eire covering offences committed in Northern Ireland. So far as non-political crimes are concerned, there never has been any serious difficulty about the reciprocal enforcement of warrants issued by the English and Eire courts respectively. But even this arrangement does not extend to executing warrants issued by the Northern Ireland and Eire courts respectively. However, the principal threat to the internal security of the Northern Province lies in the violent activities of members of the I.R.A. and other such organisations, who have only to slip back across the 200-miles-long frontier into Eire in order to be safe. This fact was underlined by Mr. Costello, the Eire Prime Minister, speaking in the Dail only a few weeks ago, when he declared: " . . . there can be no question of our handing over either to the British or the (Northern Ireland) authorities persons whom they may accuse of armed political activities in Britain or in the Six Counties" (*The Irish Times,* December 1, 1955). Repeated demands for the conclusion of an extradition treaty seem to ignore the well-settled principle that every State has the right to grant asylum to political offenders and to decide for itself what constitutes a political offence. This principle is manifested not only in the common clause inserted in extradition treaties specifically excepting political crimes from the category of extraditable offences, but also in the Extradition Act, 1870, s. 3 (1) of which provides that "a fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of political character." The difficulties, therefore, in the way of concluding an extradition treaty with Eire appear at present to be insurmountable. It will require a considerable change of heart on the part of the Eire Government before such a treaty becomes a tangible prospect. With these conditions in mind the provisions of the Special Powers Act will now be examined.

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[1] One of the interesting features about this statute is the close parallel evidenced between its provisions and those of the long-forgotten Restoration of Order in Ireland Act, 1920, an enactment of the Westminster Parliament which has only recently been repealed by the Statute Law Revision Act, 1953. Nowhere is this parallel instanced better than by comparing the offences created by the Special Powers Act (N.I.), 1922, s. 2 (the subject of criticism in the present article) with the Offences created by Regulations 47-50 of the Restoration of Order in Ireland Regulations (S.R. & O. 1920, No. 2120). Particularly enlightening, also, is a study of the Republic of Eire's Offences against the State Act, 1939, in comparison with which the Northern Ireland statute almost pales into moderation. It was under the provisions of the Offences against the State Act, 1939, that a Suppression Order was made on June 23, 1939, declaring the I.R.A. an unlawful organisation within the Republic. This Order has remained dormant but recently it has been invoked to prohibit the publication in Eire and foreign newspapers of any communication of news regarding the I.R.A. or any other unlawful organisation (see *The Times*, December 3, 1955).

### *The civil authority and the Royal Ulster Constabulary*

Its principal purpose is as an enabling statute which confers upon "the civil authority" well-nigh unlimited powers for preserving peace and maintaining order.[2] Indeed, the only express limitation upon such delegated power consists in the nobly expressed condition that "the ordinary course of law and avocations of life and the enjoyment of property shall be interfered with as little as may be permitted by the exigencies of the steps required to be taken under this Act" (s. 1 (1)). However noble such sentiments may be, it will be as well in this study of the Act to have regard to the practical realities of the powers conferred by Parliament, which may seem to render rather hollow and illusory the safeguards contained in the above proviso. The "civil authority," to whom these extensive powers are delegated, is the Minister of Home Affairs for Northern Ireland, but under section 1 (2) the Minister is empowered to delegate all or any of his powers under the Act to any police officer. In practice, this generally amounts to the Inspector-General of the Royal Ulster Constabulary, a police force whose status is quite different from that of the county and borough police forces in Great Britain. The nearest parallel, but not to be taken too literally, is the Metropolitan Police Force which is directly responsible to the Home Secretary. In Northern Ireland, the R.U.C. comes under the direct control of the Minister of Home Affairs.

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[2] The relevant passage in s. 1 (1) reads: "The civil authority shall have power, in respect of persons, matters and things within the jurisdiction of the Government of Northern Ireland, to take all such steps and issue all such orders as may be necessary for preserving the peace and maintaining order. . . ." In *R.* (*O'Hanlon*) v. *Belfast Prison* (*Governor*) (1922) 56 Ir.L.T.R. 170, the Northern Ireland Divisional Court dismissed an application for a writ of habeas corpus which contested the validity of an order of internment made under Regulation 23B (revoked in 1949) by the Minister of Home Affairs. Comparing the order with those made by the Home Secretary under the Defence (General) Regulations, the court relied on the decision in *R.* v. *Halliday, ex p. Zadig* [1917] A.C. 260. Comparison may also be usefully made with the formula "has reasonable cause to believe," and the different interpretations adopted by the House of Lords in *Liversidge* v. *Anderson* [1942] A.C. 206, towards its use in Defence (General) Regulation 18B, and by the Privy Council in *Nakkuda Ali* v. *Jayaratne* [1951] A.C. 66, in respect of the same words in a Ceylon Control of Textiles Regulation.

Delegation of statutory authority to a Minister of the Crown is, of course, a familiar enough doctrine in this country. To translate the legislature's intention into an effective policy it is frequently necessary to formulate new offences, and it is probably true to say that the great bulk of statutory crime at the present day has been created under the exercise of such delegated power. The empowering, therefore, of the Northern Ireland Minister of Home Affairs to make new regulations and to vary or revoke existing regulations does not call for any comment. Where, however, the Special Powers Act (N.I.), 1922, diverges in startling fashion from the established practice in this country is in the procedure laid down for annulling regulations made in pursuance of the enabling statute. The fact is that, under this statute, the Northern Ireland Parliament has surrendered the ultimate right to disallow any of the Minister's regulations, for under section 1 (4) both Houses may only petition the Governor for annulment. In so far as the Governor may be expected to act constitutionally in accordance with the advice of the Executive, the position is that within the field of maintaining law and order Northern Ireland appears to be committed to government by decree. There remains, of course, the Executive's ultimate responsibility to Parliament for its policies, but even this safeguard is considerably weakened by the absence of an effectual Opposition.

### *Offences under the Special Powers Act and Regulations*

When turning to consider the operation of the Special Powers

Act and the offences made thereunder, it is necessary to point out that these provisions are supplementary to, and do not supersede, the existing substantive law. With very few exceptions, which will be discussed in a later article, all those crimes which exist in our criminal calendar are equally applicable in Northern Ireland. The major departure from English law, it is suggested, is contained in section 2 (4) of the 1922 Act which provides: " If any person does any act of such a nature as to be calculated to be prejudicial to the preservation of the peace or maintenance of order in Northern Ireland and not specifically provided for in the regulations he shall be deemed guilty of an offence against the regulations." Clearly this constitutes a violation of the well-established principle *nulla poena sine lege,* namely, that there must be no crime except in accordance with fixed, predetermined law. The importance attached to this salutary doctrine may be judged from the fact that it is now embodied in article 11 (2) of the Universal Declaration of Human Rights, of which the United Kingdom is a signatory, and which was pronounced at the General Assembly of the United Nations in 1948. It must, however, be said at once that there is no evidence that this arbitrary provision in the Special Powers Act has either been misused or, indeed, ever invoked. But whilst a large-scale revocation of existing regulations, many of a very severe character, took place during the years 1949, 1950 and 1951, this inherent threat to the principle of personal liberty remains a blot on the statute book of Northern Ireland.

Another provision which is likely to cause dismay among those who consider that even the offence of misprision of felony has fallen into desuetude is that contained in section 2 (3) of the Act. This subsection declares that it is " the duty of any person who knows, or has good reason for believing, that some other person is acting, has acted, or is about to act, in contravention of any provisions of the regulations to inform the civil authority of the fact." Failure to do so constitutes an offence against the regulations. This imposition of penal consequences for the mere failure to inform is repugnant to our traditional methods of enforcing the law. Even if it be maintained that the security of the Province demands the continued existence of certain offences and additional powers of search and arrest, it may well be questioned whether a case does not exist for overhauling the machinery for enforcing the law. For surely it will be agreed that the evils of this type of special powers legislation must, consonant with prevailing circumstances, be reduced to the minimum.

Steps have already been taken to abolish a considerable number of offences, amongst which may be mentioned:

Being or remaining out within a prohibited area after curfew (reg. 1);

Failing to give information, or knowingly giving false information as to the purposes for which motor spirit is used or kept (reg. 9);

Selling or removing property of which the civil authority has notified its intention to take possession (reg. 8);

Failing to comply with an order issued by the civil authority requiring any person to furnish such information as may be specified in the order (reg. 22);

Doing or attempting to do any act calculated or likely to cause disaffection among the police or the civilian population (reg. 16).

The alleviation represented by the withdrawal of these regulations was regarded at the time as evidencing the Government's belief that terrorism was no longer a present threat to the internal security of the Province. Then, in 1954, there followed the series of I.R.A. armed raids which immediately led to the reintroduction of powers which had been dispensed with in 1950. Further powers were introduced following the recent abortive attack on a police barracks. Some idea of the extent of the powers, exercisable today by members of the Royal Ulster Constabulary, may be obtained by examining the new regulations (S.R. & O. (N.I.) 1954, No. 90, and 1955, No. 176). Thus, adopting the now time-honoured criterion, " if a police officer suspects that the preservation of peace or the maintenance of order is likely to be prejudiced " the most striking of these regulations permit such officer to:

Stop and search any vehicle travelling along any public road, and seize the vehicle or anything found therein (reg. 5);

Stop and question any person, who must answer any questions reasonably addressed to him (reg. 7);

Authorise the arrest without warrant and detention for a period of not more than twenty-four hours of any person for the purpose of interrogation (reg. 10);

Stop and search any person suspected of carrying firearms, ammunition, explosive substance or any article or document, and seize the same (reg. 6).

This last regulation is of considerable interest in the light of the Prevention of Crime Act, 1953. At the time when this measure was being debated in the Westminster Parliament, the principal argument advanced in support of it was the claim made by the police that, if a halt was to be called to the rising number of crimes of violence against the person, the police must be given power to apprehend a person found in suspicious circumstances in a public place carrying an offensive weapon. Existing offences under the Firearms Act, 1937, ss. 22 and 23, which applied only to lethal or imitation firearms, and the Public Order Act, 1936, s. 4 (1), which was restricted to carrying weapons at public meetings or public processions, were said to be inadequate. Neither of these earlier statutes applies to Northern Ireland, but it was felt that the comparatively low rate of crimes of violence in the Province did not justify the introduction of legislation corresponding to the Prevention of Crime Act, 1953. A close examination of the new regulation 6 above, however, shows that it is sufficiently wide to fulfil the objects of the English Act, and, indeed, much more, for it is noteworthy that the 1953 statute still does not empower the police to stop and search a passer-by.

Censorship of newspapers and other organs of the Press is a symptom normally associated with dictatorship methods of government, and the reputation abroad of the Northern Ireland Government has suffered, at times, through allegations, to put it crudely, of muzzling the Press. Are these allegations true? Judged by my own personal experience of reading, for some years now, the various newspapers published in Belfast and Dublin with pronounced political sympathies towards either the Unionist or the Republican cause, I can assert with every confidence that complete freedom exists to express the most candid and extreme opinions on both political and religious issues. A year ago, it is true, two I.R.A. publications were banned, both of which advocated the use of violence and were palpably seditious in tone. The power to prohibit publication of any newspaper, periodical, book, circular or other printed matter in times of peace is, of course, a very disturbing matter. It was first introduced in Northern Ireland in 1943, withdrawn in 1950, and reintroduced in 1954 (S.R. & O. 1954 (N.I.), No. 179). In addition to conferring upon the Minister of Home Affairs the right to ban any such publication " if it appears [to the Minister] to be prejudicial to the preservation of the peace and the maintenance of order," the regulation goes on to make it an offence for any person to have such printed matter in his possession without lawful authority or excuse. Furthermore, if any such publication is found on premises in or under the defendant's occupation or control, or in premises in which he is found or has resided, the order places the burden of disproving possession upon the defendant. Were such wide powers to be used to any considerable extent there would be every justification for the allegation that democratic government had ceased to exist in Northern Ireland. But, with the exception of the I.R.A. papers banned in 1954, there is no evidence that these powers have either been put into effect or used as a threat to secure a less independent Press.

### *Punishment of offences*

Originally, offences created under the Civil Authorities (Special Powers) Act (N.I.), 1922, and its related regulations, were triable only by a court of summary jurisdiction consisting of not less than two resident magistrates (similar to our stipendiary magistrates). The maximum punishment which could be inflicted by such a court was two years' imprisonment and/or £100 fine. However, under the Civil Authorities (Special Powers) Act (N.I.), 1943, which is still in force, either summary proceedings or trial by indictment may be instituted for all such offences. Whereas the maximum sentence in cases of summary conviction is left the same, in the event of the accused being tried at quarter sessions or at assizes provision is made for a minimum sentence of three years', and a maximum of fourteen years', imprisonment and/or £500 fine. The prevailing tendency has been to have charges summarily disposed of by a resident magistrate, though it is significant that the eight members of the I.R.A. who were arrested after the last raid on Omagh military barracks in 1954 were indicted, not for any of the multifarious offences under the Special Powers Act regulations, but under the Treason Felony Act, 1848, s. 3, with "compassing and intending to levy war against Her Majesty the Queen . . . in order to put force and constraint upon and to intimidate and overawe both Houses of the Parliament of the United Kingdom."[3] All the accused were found guilty and sentenced by Lord MacDermott, the Lord Chief Justice of Northern Ireland, to ten years' imprisonment.

Special punishments, too, are a feature of the Special Powers Act and these apply to persons convicted in Northern Ireland of certain crimes well known in English law. The most striking of these is contained in section 6 of the 1922 Act which provides that a crime under the Explosives Substances Act, 1883, ss. 2 and 3 "shall be a crime punishable by death." It should, however, be pointed out that this provision has never once been invoked. It would be interesting to discover the number of occasions on which resort has been made to its only parallel in English law, *viz*., the Naval Discipline Act, 1866, s. 34, which provides that every person " who shall unlawfully set fire to any dockyard, etc. . . . shall suffer death or such other punishment as hereinafter mentioned." Another sphere in which the divergence from English law is most noticeable is the continued existence of corporal punishment as a judicial penalty in Northern Ireland. Not only is it retained for all those crimes which in Great Britain, prior to the passing of the Criminal Justice Act, 1948, carried a possible sentence of whipping, but section 5 of the Northern Ireland Act of 1922 authorises corporal punishment for the following additional offences:—arson; any offence punishable on indictment under the Malicious Damage Act, 1861 ; demanding with menaces with intent to steal (Larceny Act, 1916, s. 30) ; any offence under the Firearms Act, 1920, in relation to the possession of firearms ; and any offence against the regulations in relation to the possession of firearms, military arms, ammunition or explosive substances. An analysis of the incidence of corporal punishment in Northern Ireland since 1922 will be given in a subsequent article.

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[3] Additional counts in the indictment, which were left on the file, included: possessing explosives with intent to endanger life (Explosive Substances Act, 1883, s. 3 (*b*)); shooting with intent to do grievous bodily harm (Offences against the Person Act, 1861, s. 18); being found by night, armed with intent to commit a felony (Larceny Act, 1916, s. 28 (1)); and unlawful assembly.

### *Public order and the display of flags and emblems*

As might be expected, power to prohibit public meetings and processions was provided for in the regulations, and these powers have since been embodied in the Public Order Act (N.I.), 1951. Although ostensibly modelled on the Public Order Act, 1936, the Northern Ireland statute contains some notable omissions which indicate the radical difference of approach to the problems of maintaining order. Thus, under section 2 (5) of the English Act the consent of a High Court judge is necessary before a search warrant is issued authorising the entry and search of premises suspected of being used by persons bent on achieving political ends by the use of physical force. The Northern Ireland statute of 1951 is silent on this matter, but under a 1954 regulation (S.R. & O. 1954 (N.I.) No. 90) any police officer of whatever rank may, if he suspects that any land or building or vessel is being used in any way prejudicial to the preservation of peace and the maintenance of order, enter and search such building, etc., if needs be by force, and seize anything which he suspects is being used for such purposes.

Another interesting basis for comparison concerns the display of flags, banners or emblems. Under the Public Order Act, 1936, s. 3 (1), the display of such emblems may be forbidden on the orders of a chief constable [in London, the City or Metropolitan Commissioner as the case may be], provided he is satisfied that such a step is reasonably necessary to prevent the risk of a breach of the peace. It may be added that in the case of banning public processions the much higher standard of a threat of serious public disorder is the governing criterion. Failing to comply with such an express order is an offence under English law, but Northern Ireland law goes much further. Thus, under the Public Order Act (N.I.), 1951, s. 3, it is a summary offence for the owner or occupier of premises at any time to display anything whereby a breach of the peace is likely to be occasioned. It will be observed that the scope of this offence is sufficiently wide to embrace conduct which is provocative to any body of persons, irrespective of their political or religious beliefs. How very different are the provisions of the recently enacted Flags and Emblems Act (N.I.), 1954, which savours strongly of political discrimination, being principally directed against the Anti-Partitionists whose declared policy is the overthrow of the Constitution. Section 1 of this enactment makes it an offence for any person to prevent or threaten to interfere by force with the display of the Union Jack on or in any land or premises. On summary conviction the maximum penalty is six months' imprisonment and/or £50 fine, but on conviction on indictment the maximum penalty for this, to say the least, unusual offence is raised to the staggering figure of five years' imprisonment and/or £500 fine. Such discrimination is carried one stage further in the succeeding section which deals with the removal of provocative "emblems" which term, for the purposes of the section, is defined as "including a flag of any kind other than the Union Jack." This seems clearly designed to prohibit the flying of the Tricolour of the Republic of Eire. Leaving national flags aside, no distinction appears to be drawn in respect of badges or, presumably, banners, so that, for example, the display in a predominantly Republican (or Nationalist) district of insignia representing support for the Orange Order can be terminated on the instructions of the police. So far there has been only one prosecution under this Act, for unlawfully preventing the display of a Union Jack, in which a fine of £5 was imposed by the resident magistrate. The three defendants admitted taking the flag away and burning it. Another interesting sidelight is afforded by the requirement that the consent of the Attorney-General is necessary before criminal proceedings are instituted under the Flags and Emblems Act (N.I.), 1954, whereas prosecutions under the Public Order Act (N.I.), 1951, may proceed without such authority.

*Incidence of prosecutions under the Special Powers Act*

In the belief that it would afford some light on the policy adopted in enforcing these widely drawn provisions I have investigated the number of prosecutions for offences under the Special Powers Act and Regulations instituted during the period 1945–1955. It will, of course, be appreciated that this survey takes no account of the number of occasions when, for example, the powers of search or arrest have been exercised by the police without any ensuing prosecution. However, the absence of such statistics—if indeed they could be relied upon as accurate—should not, it is suggested, inevitably lead to the belief that the exercise of these special powers is widespread. Reverting then to prosecutions, what conclusions can be drawn? The most significant evidence is the total absence of any prosecutions during seven out of the eleven years under review, the only years without a clean bill being 1945, 1946, 1950 and 1954. Secondly, only three regulations constituting offences have been invoked during this same period. The first of these, Regulation 1A (revoked in 1946) related to the production of identity cards, and of the forty-nine prosecutions brought to court forty-four resulted in convictions. Regulation 24A, which is still in force, relates to membership of unlawful associations, amongst which are listed the Irish Republican Army, the Irish Republican Brotherhood, the Irish Volunteers and the National Guard—two prosecutions in 1945 and three in 1954 comprise the total charges brought under this regulation, only one case resulting in an acquittal. And there has been only one prosecution, resulting in an acquittal, in 1950 under Regulation 24C, which relates to the display of the Tricolour flag of the Republic of Eire—this regulation has now been replaced by the Public Order Act (N.I.), 1951, s. 3, and the Flags and Emblems Act (N.I.), 1953, s. 2. Finally, it is especially noteworthy that during the period under review there has been a complete absence of any prosecutions under the Special Powers Regulations dealing with offences involving the possession of firearms or explosives.

Indeed, the overall paucity of prosecutions in recent years points unmistakably to the policy of toleration on the part of the Northern Ireland Government, which is also manifested in other spheres, principally that of education. There remains the feeling, however, that many of the offences discussed above are otiose and could be safely dispensed with in reliance on the adequacy of the ordinary criminal law to deal with the violent and subversive criminals. Such powers as are retained may well be justified having regard to the constant threat to the internal security of the State, a situation exacerbated by the, in some ways, understandable attitude of the

Eire Government in granting asylum to those who, from political motives, commit crimes of the most violent and heinous character in Northern Ireland. What is necessary is that those who do not live in the midst of these exceptional conditions should properly appreciate the case for the retention of the special powers discussed in this article.

# *Australian Police Notes*

## Document J in the Petrov Affair

The legal and political implications and repercussions, if any, of the recently released report of the Royal Commission on Espionage in Australia are left for discussion to those of the two professions directly concerned. I direct my attention here to the one phase of the long hearing interesting from the police aspect: the question of whether or not a person conveys sufficient of his individuality to the paper when he operates a typewriter to allow the finished document to be identified as his work.[1]

No doubt most interest throughout the sittings focused on a hastily typed carbon-copy document of thirty-seven foolscap pages, held together with a wire staple, which was market Exhibit J and referred to in the local papers so often as Document J that even counsel and witnesses sometimes gave it that title instead of following the forensic term. This has probably been the most discussed, most widely publicised, and most fiercely argued bundle of paper in the history of Australian courts, and that is perhaps the more remarkable when it is remembered that, in common fairness to those libelled by it, little of its contents was published to any counsel and witnesses discussing some aspect of its conception and birth. Indeed, not even counsel, save those assisting the Commissioners, were permitted to see any more of the document than concerned their clients. This was the document described by senior counsel assisting the Commissioners in his opening address as a " farrago of facts, falsity and filth," a description acknowledged to be apt by most who read it.

The heaviest barrage was directed towards Mrs. Petrov, who swore that she was present at the Russian Embassy at Canberra in May, 1953, when the document was typed in duplicate by one L., a journalist, at the request of Antonov, then Tass representative, who paid L. £30 for the work. The original was sent to Moscow; the duplicate later found its way to security officials and became in due course Exhibit J.

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[1] See " Aspects of Forensic Science—Forgery by Typewriter " [1955] Crim. L.R. 407.

Mrs. Petrov's evidence of authorship was supported by technical evidence, (a) identifying with L.'s handwriting some printed letters marking certain paragraphs, (b) proving that the typewriting was done on the same machine as some letters proved to have come from the Russian Embassy, and (c) the identification of the typewriting as the work of L., by reason of its similarities with admitted examples of L.'s typewriting.

Problem (c) is not often propounded to experts in document examination; but seldom does a document of such proportions as Exhibit J, and providing such a wide field in which to find peculiarities, become the questioned document. The expert opinion that L. had typed Exhibit J was at all times strongly, and sometimes hotly, disputed by senior counsel, who adduced many arguments. Strangely, it seemed at the time, the theory that many people may possess similar habits in their typing practice was not put forward with any force, although this may have indirectly flowed from the allied proposition that many of the habits urged by the expert to be peculiarities were, instead, standard procedure.

As in all identifications made in the technical sphere of police work the problem of proof was resolved as one of probabilities; one looked for irregularities—departures from common or accepted procedures—and searched the specimen group of documents to determine whether or not they existed there. And, of course, to see if there were peculiarities in the specimen group not to be found in the questioned document.

### *Typewriting habits*

Now where might these identifying habits be found? First, there are what might be termed the mechanical signs, including the number of spaces left when indenting the initial letter of a paragraph; whether or not any effort is made to maintain regularity in the spaces left at the right hand ends of lines; the breaking of words to ensure some alignment of the last letter of lines; number of spaces left between sentences; the arrangement of headings; the number of spaces, if any, left between initials and the first letter of a name, and between initials combined as an abbreviation, such as N.S.W., A.L.P., etc.; the method followed in blocking out mistakes; and the skill as a typist evident from the number of wrong keys struck and regularity or otherwise of the force applied to the keys.

Secondly, there are the intentional departures from normal procedures, such as the habitual over-use of inverted commas, dashes, commas or semi-colons; the use of typewriter characters in unusual ways; the use of dashes instead of commas or brackets for parentheses; the over-use of capitals or their omission when properly called for; too free use of the exclamation mark, and whether or not a stop is placed after that sign; errors in the relative positions of inverted commas and full stop at the end of sentences; the use of a space before or after the possessive apostrophe; whether an " s " is added after the apostrophe to possessive proper nouns ending with " s "; the over use of parentheses in any form; whether collective nouns are treated as singular or plural; whether or not the parts of composite adjectives are joined with hyphens; excessive underlining; incorrect use or omission of the hyphen and the author's choice as to a hyphen in such words as co-operate and homosexual; the methods followed in typing dates, fractions, abbreviations, numbers, and amounts.

In the third group to be studied are characteristic deficiencies in knowledge, such as errors in syntax, synthesis, accidence, anaphora, spelling, anastrophe, designations of well-known persons, and in the observance of simple rules of grammar generally.

Fourthly, we search for peculiarities of phrasing which might indicate the suspect, such as his choice of words either singly or in phrases, the use of what is often termed journalese, similarity of views on a particular subject and especially if the views are expressed in the same phrases.

When debating the problem of authorship, the drawing of attention to one, or even a few similar idiosyncrasies in two documents may have little weight in determining the question, but when one finds perhaps upwards of thirty similarities of wrong or unusual practice, or of an otherwise significant nature in two documents, and no others, of course then the argument that one person typed both is almost if not entirely irresistible.

It can well be urged that there is nothing unusual in a person placing his stops incorrectly in relation to quotation marks; in omitting the hyphen from compound adjectives or slipping one into such words as homosexual, subpoena, roneoed; in using inverted commas with abandon; leaving a space between apostrophe and " s " in possessives; in writing " the better Australians will like " when he means " the better will Australians like," or " a former dog-racing writer " instead of " a former writer on dog racing "; in making slips of synthesis such as " a handful of Australians have," or in departing from the usual or accepted in any of the forty or more fields in which identifying points may be found. When, however, it is shown that two documents possess twenty or thirty irregularities of an identical nature, and that neither has marks of individuality not to be found in the other, a condition is reached where to deny a common origin is almost to refute the possibility of proof by circumstantial evidence.

Exhibit J and the specimen documents of L. were found to have matching peculiarities in many of these classes; while nothing is to be gained by referring in detail to most, one might be mentioned as of more than ordinary interest in the problem. Throughout both Exhibit J and the specimens there was a marked over-abundance of inverted commas; they were applied to the names of newspapers, used to indicate the use of a word in a contradictory or sarcastic sense ("cultured," "gentleman," "victory"), and where the words were meant to convey an opposite connotation; and for such terms as "the Stern gang," "finishing school," "sympathy campaign," "public relations," "White Australia," "American aid," "strategic centre," "talking too much," "Unamerican," "interest groups," "junior farmers," "business surveys," "framing," "murder plot," and "Industrial roundsmen." Also for the names of organisations, patent foods, trade names, professions, and so on.

The question, whether or not it was either necessary or correct to use inverted commas for many of these terms was quite warmly disputed; one particular word, "Peeler," was seized on by counsel, who claimed that it should be shown between inverted commas as opposed to the expert's view that the marks were unnecessary because the word has been in common use for more than a hundred years. The experts did not appear to be exactly of the opinion of one at least of the Commissioners on this point; but because the whole of the evidence concerned a doctrine that is believed to deny religious teachings, a temptation to mention that in the whole of the Bible there are no inverted commas, yet notwithstanding their omission it is a work both easy to read and grasp, was successfully resisted.

"INSPECTOR."

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# *The Law and Homosexuality*

By J. P. Eddy, Q.C.

When I supported at the annual general meeting of the Magistrates' Association an amendment—which was carried by 256 votes to 91—to reject the council's recommendation on the subject of homosexual offences, I felt it was necessary to consider the whole problem in its historical setting, and also in the light of the fact that in the near future a psychiatric institution within the prison system may be established in this country, where treatment may be given in appropriate cases.

From ancient times sodomy has been regarded as a crime of great gravity. The Old Testament indicated death as the proper penalty (Leviticus xx, 13). In the reign of Richard I men were hanged and women were drowned for unnatural offences (3 Co.Inst. 58). Indeed, with a brief pause from 1553 (1 Mar. st. 1, c. 1) to 1563 (5 Eliz. 1, c. 17), death apparently remained the penalty for the major offence until 1861, when, by section 61 of the Offences against the Person Act, it was reduced to imprisonment for life. That is still the maximum penalty. By section 62 of the Act the maximum penalty for an attempt to commit the offence, or for any assault with intent to commit it, or for any indecent assault upon any male person, is ten years' imprisonment.

### *History*

What influenced the council of the Magistrates' Association in making its recommendation was the history of the manner in which section 11 of the Criminal Law Amendment Act, 1885, became law, and the extent to which it has assisted the operations of blackmailers. For both these matters it relied on passages in Sir Travers Humphreys's book, *A Book of Trials*, published in 1953. It must, of course, be borne in mind that section 11 is dealing solely with the lesser offence of gross indecency between male persons, in public or private, the maximum penalty for which is imprisonment for two years.

Says Sir Travers Humphreys, in giving the history of section 11 at p. 34:

> "The section in question was not included in the Bill as it was introduced into and passed by the House of Lords. It was entitled 'A Bill to make further provision for the protection of women and girls, the suppression of brothels, and other

> purposes,' and it contained no reference to acts of indecency between males.
>
> "During proceedings in committee of the House of Commons Mr. Labouchere moved an amendment to include words which ultimately became section 11 of the Act. No objection was raised, though one Member did ask whether it was in order to introduce a matter so foreign to the objects of the Bill; he was assured by the Speaker that anything could be moved by leave of the House.
>
> "So it was that it became a criminal offence for any male person to take part in any act of gross indecency in public or private with another person of the same sex."

On the question of blackmail Sir Travers Humphreys says that he had "prosecuted, defended and tried too many blackmailers to entertain any doubt that the section has materially assisted such persons to carry on their nefarious trade."

In view of the effect of the section in assisting blackmailers, it may well be considered that the law needs strengthening. To support a charge of threatening to accuse a person of a crime as defined by section 29 (3) of the Larceny Act, 1916, it is necessary that the crime (with some exceptions which are not material for my present purpose) should be one for which a sentence of imprisonment for not less than seven years may be imposed. The offence of gross indecency between male persons is therefore not within the subsection. (See *R.* v. *Gilgannon* (1899) 63 J.P. 457, and see also Archbold, 33rd ed. 698.)

### *Age of consent*

The recommendation of the council of the Magistrates' Association was embodied in a memorandum of evidence which it had submitted to the Departmental Committee on Homosexual Offences and Prostitution. The council had approved it by 41 votes to 33. The substance of it was that homosexual conduct in private between consenting adults aged thirty or over should no longer be a criminal offence. For males below the age of thirty the law was to remain unaltered. There was a proviso that a mentally defective person should be incapable of giving consent at any age.

I venture to think there could be no surer sign of national decadence than for this country to abrogate its laws on this subject in favour of homosexuals of thirty and upwards. There could be no greater travesty of justice than for it at the same time, while freeing such homosexuals of criminal responsibility, to continue to enforce such laws against those who happened to be under thirty.

The argument is that not until the age of thirty can a man be considered to be "set in his ways." It is based on the fact that section 21 of the Criminal Justice Act, 1948, provides for sentences of preventive detention on persistent offenders at the age of thirty.

### *The East-Hubert Report*

But if the contention is that all homosexuals of thirty and upwards are beyond the reach of psychological treatment, I can only say that there is evidence to the contrary. It is to be found in the Report on the Psychological Treatment of Crime, which was published in 1939 by the late Sir Norwood East (formerly Medical Commissioner of Prisons) and the late Dr. W. H. de B. Hubert (formerly psychotherapist at H.M. Prison, Wormwood Scrubs). The authors carried out an investigation at Wormwood Scrubs to ascertain the value of psychological treatment in the prevention and cure of crime. Many of the cases they examined related to sexual offenders, and those in which there were encouraging results were not confined to men under thirty.

Even in the case of preventive detention men it is clearly wrong to assume that all are beyond hope of reform. This is shown by the remarkable experiment at Bristol, where selected prisoners from Parkhurst live in a hostel inside the local prison and go out to work like ordinary citizens.

### *Imprisonment without treatment*

It is probably true to say that, with perhaps one or two exceptions, the prisons of England have hitherto had little to offer homosexual offenders in the way of appropriate treatment. Yet there can be little doubt that imprisonment in such cases without such treatment may do more harm than good.

In 1949 a joint committee of the British Medical Association and the Magistrates' Association, who had had under consideration for some months the problems of the criminal law and its application to sexual offenders, issued its report, and this was reprinted in 1954. This committee was convinced that in regard to sexual offenders punishment without treatment was not likely to have a beneficial effect. Indeed, said the committee, "it can make these offenders worse, and thus more likely to repeat their offences. In a high proportion of cases imprisonment without treatment may have consequences to the community even more dangerous than to the offenders themselves."

The committee said that most psychiatrists viewed homosexual conduct mainly from the medical standpoint. "They recognise that such conduct reveals a pathological state that may well be amenable to treatment. They believe that mere punishment, and in particular imprisonment, is not likely to result in any cure. On the contrary, such a course may make the condition of these delinquents definitely worse. The psychiatrist recognises also that in some cases conduct of this nature is the result of physical abnormalities, probably innate and due to the abnormal functioning of the endocrine glands. In such cases men often have definite feminine physical characteristics. Many homosexuals regard homosexual conduct as the natural expression of their sexual desires. Cure is not likely in these latter cases, since desire for cure is lacking in them."

Finally, the committee urged the desirability of early diagnosis. "It seems probable that for many sex offenders prevention is easier than cure, and the adequate application of preventive measures involves diagnosis at a much younger age than obtains now. Researches must be undertaken into the problem of how to discover before or at puberty those who will subsequently show sexual aberrations. Such researches would be of the greatest value, and it may not be too optimistic to anticipate the day when the majority of potential sex offenders will be dealt with before they have begun to commit offences."

### *A new institution*

The authors of the East-Hubert Report expressed the belief that the most satisfactory method of dealing with abnormal and unusual types of criminal would be by the creation of "a penal institution of a special kind." They recommended that the primary function of this institution should be to serve as a clinic and hospital, "where cases could be investigated, and, if necessary, treated by psychotherapy and other means, and their disposal decided on."

No doubt the war caused delay in giving effect to this recommendation. However, in their report for 1954, issued last August, the Commissioners of Prisons announced that planning clearance had been obtained for a site for what they called the "East-Hubert" psychiatric institution at Grendon Underwood, near Aylesbury, and that work on it is scheduled to start this year.

But quite obviously, if the State is to ensure that appropriate treatment is available for homosexuals of thirty and upwards, as well as for those below that age, it must continue to render them amenable to the law.

# *Mr. Sutterthwick's Court*

By A. E. Jones
*Magistrates' Clerk*

## Receiving

The charge was receiving, but the man brought into the dock by Mure, the assistant gaoler, bore no resemblance either to Fagin or to the glossy master crook of more modern fiction. To call him an ordinary working man might seem vaguely impolite or sociologically imprecise by contemporary standards. However, that is what Alan Baxter had called himself when, a week ago, he applied for free legal aid. " I'm not used to these places, sir, and I can't think what to say. I need a solicitor to help me," he had said when Mr. Sutterthwick, the magistrate, objected that a charge of receiving a child's tricycle knowing it to have been stolen seemed, on the face of it, unlikely to present legal difficulty. In reply to further questions the defendant had stated that he was married, had one child, earned £8 a week, and had no savings.

" None at all? " persisted the magistrate.

" No sir. Not much chance on them wages."

Deeper research either into Baxter's financial position or into the requirements of his defence was not easy. In conformity with statutory directions[1] Mr. Sutterthwick resolved in the accused's favour the doubt he felt that a free legal aid certificate was justified. So now Mr. Durnstable stood up in the solicitors' box and announced that he appeared for the defence. Mr. Durnstable had quite a reputation locally for successful appearances for the defence, and Alan Baxter had unhesitatingly picked him out from the list shown to him.

Frell, the clerk, duly said his piece and the defendant rejected the offer of trial by jury and pleaded not guilty.

The first witness was called. He came to prove the first element in the charge, chronologically speaking, namely, that the tricycle was a stolen one. Frell soon got all that was required from him, beginning, of course, with full name, address and occupation. The witness was sure he recognised the tricycle which the detective sergeant in charge of the case obligingly held up to the view of the court ; he supposed you could say it belonged to him, though actually it was a present to his little girl. What was its value? That was rather difficult to say. But it had to be said; value might be very important in the case. Well, it was bought new for £5 10s. nine months ago; that would make it worth about £3 10s. now, the witness supposed. He had last seen it exactly four weeks ago when his little girl took it out to play with in the street. When she came in to dinner at about half past twelve she brought no tricycle with her. She said . . .

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[1] Legal Aid and Advice Act, 1949, s. 18 (1).

"No, you mustn't tell us what she said. That isn't evidence," interrupted the clerk, and proceeded to guide the witness to his report of the matter to the police, keeping a tight curb on similar veerings towards inadmissible conversations. The witness found that his evidence took an abrupt jump to the occasion, eight days previously, when he had next seen the tricycle. It was at the police station then; its appearance had not been altered since its disappearance—not that he could see.

"And had you given anyone authority to take away the tricycle?" was Frell's last question. This sounded such a silly thing to ask that the witness thought there must be a catch in it. "Well, sir, only to my little girl," he said cautiously.

It was Mr. Durnstable's turn to ask questions.

"I suppose your little girl has used her machine quite a lot?" he inquired. The witness agreed.

"You wouldn't say it was a very new looking article?" pursued Mr. Durnstable. No, the witness wouldn't.

"You wouldn't expect to get £3 10s. for it if you had to sell it?" Well, the witness didn't know about that.

"Shall I say that you wouldn't expect a dealer to give you £3 10s. for it?" If you put it that way, the witness supposed not.

"Have you ever actually seen a tricycle like this in a similar condition for sale for as much as £3 10s.?" The witness couldn't say he had; he didn't take much notice of these things.

"Doesn't it come to this, really, then, that your figure of £3 10s. is purely a guess?" The witness wasn't prepared to accept that word; he would prefer to call it an estimate.

"At any rate is it an estimate based solely on what you originally paid and the length of time you've had it?" Yes, in a manner of speaking, it was.

"And you'll agree that anybody buying it wouldn't be interested in those two things. All he'd be interested in would be the present condition of the machine and the price of similar machines in a similar condition elsewhere, wouldn't he?" The witness didn't quite see what the solicitor was getting at.

"Never mind what I'm getting at. You just answer my questions. The learned magistrate will see what I'm getting at, I hope." Well, if you wanted to know, the witness couldn't say what anybody who wanted to buy it would be interested in.

Mr. Durnstable jabbed now with the other prong of his attack. "Anyway, are you quite sure it is your machine?" he asked.

"Oh yes, absolutely," was the reply.

"Well, just tell us how you identify it. Have you got its number?" No, the witness didn't think it had one.

"What makes you sure it is yours, then?" Well, it was the same make and colour as the missing one.

"Is that all you can say about it? There are thousands of the same make and colour, are there not?" Yes, but there were scratches on the paint of this one the witness recognised.

"Oh come; any tricycle that's been used a little time by a child gets scratches. You aren't going to say that you have a mental map of the position of all the scratches made by your little girl during the months she was playing with it?" No, the witness wouldn't say he knew all the scratches off by heart, of course, but he was sure he recognised some of them.

"But you wouldn't have occasion to examine this tricycle minutely, would you? It was your child's plaything, not yours. Why should you want to examine it for scratches?" The witness didn't exactly examine it, but he naturally saw it quite a lot.

"Doesn't it come to this, really, that all you can say is that this tricycle is the same make, the same colour, and has the same general appearance as the one you lost. You can't really put it any higher than that, can you?" The witness didn't know about that, but he was pretty sure it was his machine.

"Pretty sure, but not quite sure," commented Mr. Durnstable, and sat down, feeling well satisfied.

"No, I'd say I was quite sure," said the witness, realising his error.

"I'll leave it to his worship," said Mr. Durnstable.

The next witness was a policeman in plain clothes. He had seen the defendant with the tricycle in the street and, after disclosing his official status, had asked Baxter whether the tricycle was his property. "Yes, of course," the defendant had said. How long had he had it? About eighteen months. What was he doing with it now? Well, his little son had grown too big for it so he was taking it to the street market to sell it. Where had he got it originally? Oh, he bought it at some shop—he couldn't remember which now. How much had he paid for it? About £4 he thought; he wasn't quite sure; it was a long time ago. Had he a receipt? Yes, he thought so, at home. "I said I would accompany him to his address and inspect it and verify his statements," the constable's evidence continued. "He then said 'It's no use telling you chaps lies, I see. My kids are all grown up. I bought the trike about an hour ago off a fellow in the street. He asked thirty bob for it but I beat him down to twenty-five. I was hoping to make a few bob on it. I don't know the fellow's name or address. I'd never seen him before today."

"I told him I should take him to the Station for inquiries to be made," pursued the constable, "And I cautioned him. He then said 'I've been a fool. I could see there was something fishy about it.' When formally charged and cautioned later, he replied 'Can I have bail? I've told the officer the truth now. I plead guilty to receiving it.'"

Mr. Durnstable began with one good point he was sure of making. "The defendant is a man of perfectly good character and in regular work, isn't he?" he asked. The constable agreed.

"Didn't he appear not to realise at first that you were a police constable?" was the next question.

"No, sir. I told him before I questioned him who I was."

"Still, he might not have heard you; or perhaps he didn't think you looked like one."

"I can't say about that, sir; but I don't think he'd have answered all my questions if he hadn't believed I was a police officer."

"What I'm suggesting is that that's precisely why he did answer your questions at first in the way he did—just because he didn't think you were a policeman."

"I don't think so, your worship."

"Well, we shall hear what he, himself, says about that. There isn't much of your evidence that's in dispute, constable; but I must ask you one thing. Didn't he say when arrested 'I've been a fool. I can see now there was something fishy about it'?"

The officer consulted his notebook. "No, sir. He said 'I could see there was something fishy about it.'"

"Are you sure, officer? Couldn't you have made a mistake on that? When did you make your note?"

"As soon as I got to the Station, sir."

"I put it to you that it's possible you either mistook, misheard or misremembered what he said. I suggest you said to the defendant something like 'Couldn't you see there was something fishy about it? ' and he merely replied ' I can now, sir.' Be fair, officer. Didn't it happen somewhat like that? "

" No, sir. Not at all."

" Very well, the learned magistrate will hear the evidence of the accused on that. There's just one final point. When my client said at the Station ' I'm guilty of receiving it ' that didn't indicate to you that he was admitting the charge, did it? "

" Well, sir, he'd just heard it read out."

" Oh yes, I know. But a man in that position doesn't take in everything that's read out to him. You know, don't you, that a man will often say, even when charged in these courts, ' I plead guilty to receiving it ' and then go on to say ' But I didn't know it was stolen ; which, of course, means ' not guilty '? "

" I know that, anyway," interrupted the magistrate.

" Thank you, sir," said Mr. Durnstable, and sat down.

There were no other witnesses for the prosecution. Mr. Durnstable rose again to his feet. " I have a submission to make, sir, that there's no case to answer. An essential element in the prosecution's case must be that the tricycle was a stolen one. You've heard the first witness's evidence of identification. Can you be satisfied on testimony such as that that the machine produced belongs to him? If that isn't proved the prosecution haven't made out a prima facie case. The defendant is quite willing and able to make his answer to this charge, but I ask you—with some confidence—to say, sir, that he shouldn't be called on to do so."

Similar thoughts had occurred to Mr. Sutterthwick while the evidence was being given, and he had reached for Archbold to refresh his memory of certain cases. " I'm inclined to agree," he said, " that the prosecutor hasn't established conclusively that it is his machine. But the cases of *Sbarra* [2] and *Fuschillo* [3] show that proof of ownership is not essential if an inference can properly be drawn from the evidence as a whole that the goods which are the subject of the charge were in fact stolen. The evidence given by the constable—which must be accepted for the purposes of your submission, Mr. Durnstable—presents a picture which raises a prima facie supposition, in my opinion, that the tricycle had been stolen by the man who sold it to your client. The prosecution aren't bound to prove that it is the property of some named person ; it can be taken as the property of some person unknown."

" Very well, sir, I must accept your ruling," said Mr. Durnstable, not showing any great surprise. " I'll call my client now." Alan

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[2] *R.* v. *Sbarra* (1918) 13 Cr.App.R. 118.

[3] *R.* v. *Fuschillo* (1940) 27 Cr.App.R. 193.

Baxter went into the witness box, and, in response to the encouraging questions of his solicitor told very much the same story that had been taken down from him in the latter's office. According to the defendant he had not realised that his questioner was a police officer at first, and so had just told him anything. He thought the man was a busybody, but he was considerably bigger than the defendant so it might have been imprudent to tell him to mind his own business. When his questioner said he was going to accompany him home he realised he must be a policeman, and he then told him the truth. It had never entered his head that the tricycle was stolen until the officer pointed out how suspicious the circumstances were, and then he, the defendant, had said "I can see now it was fishy." The fellow he had bought the machine from had said he was selling it because he was hard up, and the defendant had believed that. He thought it was cheap, but not absurdly cheap. He'd seen machines like it in second-hand shops for about thirty shillings.

Mr. Durnstable resumed his seat, and the magistrate put a question to the accused.

"Did you think that this was quite an ordinary way of selling a child's tricycle?"

"Well, sir, I suppose the chap wanted the money in a hurry, and thought he'd get a better price from a private person than from a dealer. If I hadn't bought it I expect he'd have gone on and asked the next fellow who came along."

"Yes," said Mr. Sutterthwick, "and from my experience sitting here I almost feel inclined to say that the next fellow would have bought it, too. But why didn't you ask his address or get a receipt?"

"I didn't think it was necessary. I never thought there'd be all this trouble."

"Did you make any inquiries at all of the man? Did you ask him where he got the machine from, for instance?"

"Well, sir, I asked him if it was all right, and he said I needn't worry as it belonged to his kid and he was out of work and hard up."

"When you asked him if it was all right, I suppose you meant, was it really his property or was it stolen?"

"I took his word for that, sir."

"Still, evidently the idea did come into your mind that it might be stolen?"

"Not after what he said, sir."

"All right. You can go back now."

The defendant returned to the dock and Mr. Durnstable rose again. "That is my case, sir," he began. "There are no witnesses. The only witness there could be is the man my client bought the tricycle from, and, for obvious reasons, I can't call him. But I hope, sir, you won't doubt the defendant's story on account of that. I submit that it's a perfectly straightforward and feasible story, and the same story that he told the police—as soon as he knew they were the police. He's given what I suggest is a satisfactory explanation of the tale he told at first. The policeman was in plain clothes, and you know, sir, that when on that sort of duty the police try to make themselves look as little like what they are as possible. Of course, it's easy to see, now, that the defendant behaved very foolishly. In fact, whether he likes it or not, I must admit that my client has behaved like a perfect idiot throughout. Of course, he should have made inquiries before he bought this machine. Of course, if he was a wise man, he'd have nothing to do with casual purchases from strangers in the street. And, of course, he shouldn't tell lies even to people he thinks are busybodies. But he's not charged with lack of wisdom or with telling lies. He's accused of a criminal offence, and it's not sufficient for the prosecution to satisfy you that, when he took this machine into his possession, he acted very indiscreetly; they have to prove that, at that very time, he well knew it to be stolen property. I submit that the defendant's denial of this should be believed and that there's no evidence to the contrary. Would a man of his excellent character commit a crime of that kind. I ask you to place no reliance on the police evidence that he said 'I could see it was fishy.' That phrase could so easily have been misheard or misreported. I ask you also not to draw any inference against my client from the price paid for the tricycle. The prosecutor's estimate of its value obviously had no reliable basis, and I submit that there's no real evidence that what the defendant paid was so much below the true value that it was bound to arouse his suspicion that the vendor had stolen it. Indeed, in spite of your ruling on my submission of no case, I still contend, sir, that there is no proof it ever was stolen. How do we know that it didn't belong to the vendor's child and that, as he told my client, he wanted to sell it in a hurry because he was financially embarrassed through unemployment? Be that as it may, I do ask you to say, sir, that on the evidence as a whole the prosecution have not discharged the burden of proof which is on them to satisfy you beyond all reasonable doubt of all the ingredients of the charge you are now sitting to try in the capacity both of judge and jury. I need hardly remind you, sir, of the well-known decision in *Abramovitch's* case,[4] that, if the accused's explanation is consistent with innocence and is one which might reasonably be true, he is entitled to be acquitted, even though you may not be convinced of its truth."

"No," said Mr. Sutterthwick. "You need hardly remind me of that case, Mr. Durnstable. I used it myself quite a few times in earlier days. But it is not so well regarded now by the Court of Criminal Appeal as it used to be."

"It hasn't been overruled, sir."

"No. Only explained."[5]

"I trust, sir, that you'll hold that the explanation does not affect the validity of my submission in this case," said Mr. Durnstable, and sat down.

The magistrate pondered a moment or two, then raised his head and cleared his throat. "Stand up," murmured the assistant gaoler to the prisoner.

"Alan Baxter," said Mr. Sutterthwick, "I've considered carefully all that your solicitor has so ably said on your behalf, and I've weighed your account of the matter. Nobody except yourself really knows what went on in your mind. I can only judge from the evidence given. I think it's sufficient to say, without going into all the points at great length, that I'm quite satisfied on the evidence as a whole that you must have known when you acquired the machine that it was stolen. That means that I find you guilty of a very serious offence. As is so often said, there would be far fewer thieves if there were no receivers. And it isn't only the professional receivers who make the thieves. It is just as much respectable citizens like you who are so greedy for a bargain that they wilfully blind themselves to the obvious facts of a situation or else deliberately accept what they know to be dishonest because of the chance of making a few shillings. If there had been any suggestion that you made a practice of dealing in stolen goods I should have sent you to prison without the slightest hesitation. I propose, instead, to make this a very unprofitable transaction for you in the hope that it may deter you and others from similar transactions in the future. You are liable on this charge to be imprisoned for six months and fined £100. I'm taking into account your good character, and your financial situation, but I can't see my way to impose a smaller fine than one of £10."

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[4] *R.* v. *Abramovitch* (1912) 7 Cr.App.R. 145.

[5] See Archbold, 33rd ed., 789; *R.* v. *Hepworth and Fearnley* [1955] Crim. L.R. 576, and *R.* v. *Richards*, p. 57, below.

"Will your worship make any order as to the tricycle?" inquired the detective in charge of the case, anxiously.

"Well, on my finding, the prisoner certainly isn't entitled to it back. If he objects to your handing it to the prosecutor, you'll have to retain it and leave proceedings to be taken under the Police (Property) Act, 1897. As they are civil proceedings the burden on the prosecutor wouldn't be so high and he might be able to satisfy the court that the machine was his."

"I shall advise my client not to make any objection to its being handed over to the prosecutor," said Mr. Durnstable. "Will you give time to pay this fine, please, sir. It's a considerable sum for a man in his position."

"I'll give twenty-eight days to pay," said the magistrate. "But, in view of the gravity of the offence, I'm going to fix the imprisonment in default of payment now. It will be 28 days. I intend this to be a punishment, not a payment on easy terms for wrongdoing."

Alan Baxter went out and paid £10 to Sergeant Chumbleton, the gaoler. It was exactly the sum he had brought with him in the hope that he would be allowed to buy himself free of prison.

Mr. Durnstable went into the general office to give details of his claim on the County Fund for the free legal aid given to the accused.

# *The Interest of Councillors*

By J. F. Garner, LL.M., *Solicitor,*
*Town Clerk of Andover*

The number of cases in recent months in which section 76 of the Local Government Act, 1933 (as amended by section 131 of the Local Government Act, 1948) has been considered suggests that a review of this difficult section may be of value. Briefly, the section provides that any member of a local authority who has a direct or indirect pecuniary interest in a matter under consideration at a meeting of the local authority must disclose the fact and not take part in the discussion or vote on the matter. In the Model Standing Orders issued by the Minister of Housing and Local Government and adopted (at least in this respect) by most local authorities, a member having an interest must withdraw from the meeting during the consideration of the particular matter, unless he is invited by the council to remain. Failure to comply with the provisions of the section (as distinct from the standing order) renders the offending member liable to prosecution, at the instance of the Director of Public Prosecutions. The section is so complicated that it is proposed to deal with points arising in the order of the section itself, and to conclude by commenting on a few applications of the section to particular circumstances taken from recent court decisions or actual practice.

### *Pecuniary interest*

In order for the section to apply, the councillor (or mayor or alderman) concerned must have a *pecuniary* interest in the matter, although it need not necessarily be a pecuniary advantage as distinct from a pecuniary loss (see *England* v. *Inglis* [1920] 2 K.B. 636). A member does not, however, fall within the section simply by reason of his interest in the matter as a ratepayer, inhabitant of the area or ordinary member of the public (s. 76 (1), proviso). In the case of married persons "living together," the interest of one spouse, if known to the other, is to be deemed to be also an interest of the other spouse (s. 76 (3) ).

### *Direct or indirect interest*

"Indirect" is defined in the section (see below), but a member may have a direct interest, however small may be the monetary value concerned. It also seems that the councillor concerned must be aware (or, possibly, ought to have been aware) of the circumstances giving rise to the interest. Although the statute does not require expressly any knowledge of the interest on the part of the defendant, it is submitted that the observation of Keating J., on quite a different statutory provision,[1] approved by Lord Goddard C.J. in *Harding* v. *Price* [1948] 1 K.B. 695, applies to this offence: "I cannot understand how, on any reasonable construction of the words, it can be said that a man can neglect to give notice with all practicable speed without knowledge of the fact of which he is to give notice."

An *indirect* interest exists where the councillor is a shareholder in a company or a member of a partnership having a direct pecuniary interest in the matter; but this will not apply if the councillor has no beneficial interest in the company, etc., or if the total nominal value of the shares in respect of which he has a beneficial interest does not exceed £500 or one hundredth of the total nominal value of the issued share capital of the company, etc., whichever is the less (but in the latter case the interest must still be disclosed): see section 76 (2) and (2A), added by section 131 of the Local Government Act, 1948.

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[1] This reasoning has been criticised, in its original context, by Dr. J. Ll. J. Edwards in his *Mens Rea in Statutory Offences*, at p. 78, but the criticism would not apply as forcefully in the present context.

*Subject of consideration*

An interest must be disclosed when a matter in connection with which the interest arises is the *subject of consideration at a meeting* of the local authority. " Meeting of the local authority " is extended to include meetings of committees, sub-committees and joint committees, by section 95 of the Local Government Act, 1933. The phrase " the subject of consideration " is not defined, but it is clear that an interest should be disclosed, even in circumstances where the committee do not propose to come to any conclusions on the matter.

*How disclosure is to be effected*

The section says the disclosure should be made as soon as practicable after the commencement of the meeting; there is something to be said for this requirement being honoured strictly, as it may then be possible to rearrange the agenda for the meeting so that an item in which a member has an interest may be taken last, thereby enabling that member to go home, without having to cool his heels in the corridor while the matter is disposed of. On the other hand, it is submitted that there can be no legal objection to the disclosure of interest being left until the particular item is actually reached on the agenda. A specific notice of this kind should be oral, and made in the course of the meeting; on the other hand, a general written notice may be given of the interest of an individual member in the affairs of a particular company or firm, etc. (see s. 76 (4)).

Clerks to local authorities are often asked to advise whether or not a particular councillor has an interest in a specified matter. In the writer's opinion the clerk should always refuse to advise the other members of the council as to the interest or otherwise of councillor A; it is not their concern, and it is entirely the responsibility of councillor A to disclose his interest, if he has one. The fact that a member may have voted on a matter without disclosing his interest will not affect the validity of the local authority's decision provided there is a quorum of members present without the offending member. Similarly, it is suggested that the clerk should not advise councillor A whether or not he has an interest in a particular case—the clerk should clearly give any necessary information to A (and the other members), and if requested so to do, he may advise all the members of the council, collectively, as to the general effect of section 76, but it is not his responsibility to advise individual councillors as to their legal position.

*Dispensations*

The Minister of Housing and Local Government (or the county council, in the case of a parish council) may remove the disability on taking part in the discussion and/or on voting on a particular matter, in favour of a particular councillor (s. 76 (8)). The application for such a dispensation is usually made by the clerk to the local authority, as the Minister must be satisfied that in the particular case the number of members disabled at one time would be so great a proportion of the whole as to impede the transaction of business, or that it is in the interests of the inhabitants of the area that the disability should be removed. At the present time this subsection is most frequently used in connection with councillors who are tenants of council houses, but in such cases the Minister rarely gives permission to vote, allowing the named councillors only to take part in the discussion.

*Offences*

Prosecutions under the section may be instituted only by or on behalf of the Director of Public Prosecutions (s. 76 (7)). Alleged offences may be reported to the Director by any person cognisant of the facts, but it is submitted that it is the duty of a solicitor or barrister clerk, to report any breach of the section of which he becomes aware in the course of his duties—at least where the facts are reasonably clear.

## Examples of Interest

*Building society director*

In *Lawrence* v. *Everett* [1955] Crim.L.R. 648 it was made clear that the matter under consideration must have some direct link with the building society of which the defendant alderman was a director. Here the council were merely considering whether or not to implement a guarantee scheme for advances made by building societies: if the council made a certain decision, the defendant's building society, in common with others, stood to benefit. Quarter sessions held that there was no direct interest, and, therefore, no breach of the section.

*Council house tenants*

It is quite clear from *Director of Public Prosecutions* v. *Gibbs* [1955] Crim.L.R. 650 that a councillor who is a council house tenant has a direct interest in any matter which may affect the terms of his tenancy, such as the imposition of a lodger tax (whether or not the particular councillor intends to take a lodger in his house). It is also, apparently, no defence for the councillor to show that he has in fact voted *against* his own pecuniary interest.

### *Chairman or mayor*

No councillor may vote for himself on an election of the mayor or chairman of the council where the council have previously decided that a specified sum should be paid to the mayor or chairman by way of remuneration or an allowance for expenses,[2] for he has a direct pecuniary interest in such a matter: see a decision of magistrates at Ashford reported in *The Times* of August 19, 1955.[3]

### *Member of charitable, etc., organisation*

Often the question is raised as to whether a councillor who is a member of a local charity trust, an officer of a local chamber of trade or a trades council, the chairman or other officer of a local sports club, or who holds some other similar voluntary office, has an " interest " within the meaning of section 76. In the writer's opinion the test in all these cases is whether the interest is a pecuniary one. If the councillor holds such a position that he personally will not gain or lose in a pecuniary sense as a consequence of the matter under consideration, it seems that he has no " interest " in the matter, in the sense of section 76.

### *Officers*

It should be remembered that an officer of a local authority is, in this matter of interest, in the same position as a member: Local Government Act, 1933, s. 123. In his case, however, proceedings may be instituted by persons other than the Director of Public Prosecutions.

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[2] Under section 18 (4) of the Local Government Act, 1933 (mayor), or section 116 of the Local Government Act, 1948 (chairman of district council), or section 3 (4) of the Local Government Act, 1933 (chairman of county council), as the case may be. In sections 3 (4) and 18 (4) of the 1933 Act, the expression " remuneration " is used, which clearly indicates a pecuniary interest, but as section 116 of the 1948 Act refers to an " expenses allowance," it could perhaps be argued that this does *not* indicate a pecuniary interest, as the chairman is not permitted to make any profit out of the office; and, in practice, no mayor ever does!

[3] It is hoped to report this case in the next issue of this *Review*.

# *Practice and Procedure*

## Quarter Sessions

*Imputations on magistrates in notices of appeal*

In a recent appeal to quarter sessions against the decision of a Metropolitan Magistrate the defendant included among the grounds of his appeal a statement that the magistrate had misdirected himself in law by holding that as a general rule the evidence of police officers was true and to be believed, whereas the evidence of motorists was untrue and not to be believed. This allegation received considerable publicity in the national press because the notice of appeal was, as is customary, read out at the commencement of the proceedings before the appeals committee. No comment appears, however, to have been made on it during the hearing, either by the counsel appearing for the parties or by the learned chairman. The magistrate concerned subsequently made a statement in his own court denying that he had said any such thing, and making it clear that, as one would expect, he did not hold the views attributed to him by the appellant.

An appeal to quarter sessions against conviction by a magistrates' court almost invariably involves a complete re-hearing of the case. The justices hearing the appeal reach their decision on the evidence given before them; they are not bound by or confined to what took place in the lower court. Accordingly, they do not need, in the ordinary way, to consider whether a magistrate there may have misdirected himself on a point of law. So long as the evidence they hear themselves is sufficient they are entitled to uphold the conviction appealed against, whatever irregularities may have occurred at the first trial.

But, though a court of quarter sessions, once it starts to hear evidence, may not be concerned with the grounds on which the appeal is brought, the formality of having the notice of appeal read out as a preliminary to the proceedings cannot well be omitted. The appellant must prove his notice to justify his right to be heard. It is open then to the respondent to object that the court has no jurisdiction to hear the appeal because the notice does not comply with the requirements of the law. It would also be possible for the appellant to raise some point of law in his notice of appeal which, if decided in his favour, would result in the conviction being reversed; the appeals committee might, in such circumstances, reach a decision merely after hearing counsel on both sides and without evidence being called.

Rule 59 (1) of the Magistrates' Courts Rules, 1952, requires " the general grounds of appeal " to be stated on the notice to be given pursuant to section 84 of the Magistrates' Courts Act, 1952. Presumably, therefore, no proceedings for libel could be taken in respect of any statements made in setting out the grounds of appeal, even although false imputations against the bench might have been maliciously made. The magistrates' clerk, on whom the notice must be served, has no authority to reject it merely because its terms are objectionable. The appellant, when before the appeals committee, need not make any further reference to the grounds of his appeal once the notice has been read out; he may rely merely on a re-hearing of the evidence. The appeal court may then have no materials on which it can form any conclusion as to the accuracy of statements made in the grounds of appeal, and, in consequence, it may well refrain from any comment on the subject. Have magistrates, then, no redress and no means of vindicating themselves if a notice of appeal contains an attack on their conduct which they consider unfair and untrue?

They may, of course, decide to be represented in the quarter sessions proceedings in order to meet allegations made in the notice of appeal. But, if the appellant does not persist in these at the hearing, the purpose of the legal representation of the bench may be frustrated—although the allegations will have been read out in open court. In view of this, it would seem only fair to magistrates against whom judicial misconduct or incompetence is alleged in a notice of appeal, that the appeals committee should require the appellant, at the commencement of the proceedings, formally to withdraw any of the grounds of his appeal on which he does not propose to proceed. Section 4 of the Quarter Sessions Act, 1849, is very much in point in this connection. The relevant part reads: " If in any notice of appeal the appellant . . . shall have included any ground . . . of appeal which shall in the opinion of the court determining the appeal be frivolous or vexatious, such appellant . . . shall be liable, if the court shall so think fit, to pay the whole or any part of the costs incurred by the respondent . . . in disputing any such ground . . . of appeal." This provision of the law could usefully be employed to discourage irresponsible appellants from making an unjustified attack on the bench with whose decision they are dissatisfied. [A. E. Jones.]

### *Effect of order made by quarter sessions on appeal*

A most interesting point has been raised by Brigadier Willway at [1955] Crim.L.R. 767 concerning the power of a magistrates' court to remove after six months a disqualification for driving imposed by quarter sessions on appeal. A similar point arises where quarter sessions on appeal substitutes a probation order for a sentence passed by a magistrates' court, and subsequently it is sought to discharge that order.

It is clear from section 86 of the Magistrates' Courts Act, 1952, that quarter sessions and the magistrates' court against whose decision the appeal was brought have equal powers to enforce any decision made by the appeal committee. That is why it is wise for a clerk to justices to inquire whether quarter sessions has taken any steps to recover a fine imposed on appeal before he takes any action in his own court. But, as the article points out, removal of a disqualification is not a process to enforce a decision; equally, one might add, discharging a probation order is not a process to enforce a decision. In both cases the enactment governing the procedure gives power to act only to the court by which the order was made.

The point of importance is made by Brigadier Willway where he says: "There can be no doubt that an application can be made to quarter sessions." With diffidence, it is submitted that in both the cases concerned, quarter sessions has no jurisdiction to entertain an application.

The reasons for this submission are found in section 31 of the Summary Jurisdiction Act, 1879, and section 86 of the Magistrates' Courts Act, 1952. Under the former section, quarter sessions in deciding an appeal may only exercise in any order it makes "any power which the court of summary jurisdiction might have exercised," and in awarding punishment it is limited to punishment "which that court might have awarded." The second section referred to provides that "the decision of the court of quarter sessions shall have effect as if it had been made by the magistrates' court against whose decision the appeal is brought." Is it unreasonable to read these two sections together so as to produce the interpretation that any decision made on appeal by quarter sessions becomes the decision of the magistrates' court and has effect as if made by it, with the additional provision already mentioned that so far as enforcement of the decision is concerned both courts have equal jurisdiction?

If this interpretation is correct then an application to remove a disqualification or to discharge a probation order made in these circumstances can be entertained only by the magistrates' court from whose decision the appeal was brought.

A further point of interest is under section 8 of the Criminal Justice Act, 1948. If quarter sessions makes a probation order on appeal, and the probationer is convicted summarily of an offence committed during the period of the order, is that order to be regarded as one made by quarter sessions or as one made by the magistrates' court? If the former then the offender can only be dealt with by quarter sessions; if the latter then either the magistrates' court or the supervising court can deal with him. This is not quite the same point as before as it may be argued that in these circumstances the court is enforcing the decision. It is thought, however, that such an interpretation of the word "enforce" is inapt. A probation order is not enforced, as is payment of a fine. It is either complied with or not, and if not the non-compliance leads to a further decision, in one of the ways open to the court. It is suggested, therefore, that in such a case as this, the probation order should be dealt with, not as one made by quarter sessions, but as one made by the magistrates' court from whose decision the appeal was brought. [A. J. C.]

## Summary Justice

### *Armed forces*

National Service. Jehovah's witness failing to submit to National Service medical examination; fined £5 the previous day on a similar charge; sentenced to twelve months' imprisonment; Sproats: Worcester Magistrates' Court (*Manchester Guardian*, November 25, 1955).

### *Animals*

Slaughter. Apprentice, aged seventeen, slaughtering lamb at an abattoir without a licence; fined £5; Lister: Liverpool Magistrates' Court (*Liverpool Evening Express*, November 23, 1955).

### *Aviation*

Low flying. Flying aeroplane as low as 80 to 200 feet over Bradford; fined £50; Dawson: Bradford Magistrates' Court (*Liverpool Daily Despatch*, November 9, 1955).

Airport. Driving car on a manoeuvring area at an airport without permission; fined £5; Moxon: Feltham Magistrates' Court (*Evening Standard*, November 21, 1955).

### *Children*

Fireguard. Man and wife allowing seventeen-month-old child to be in room with open fire grate insufficiently guarded; child pulled kettle of boiling water off the hearth and died of scalds; man fined £10, wife granted conditional discharge; Hunt: Chesterfield Magistrates' Court (*Birmingham Mail*, October 29, 1955).

### *Customs and excise*

Prohibition of importation. Importing five tubular stranding machines and three moulding and vulcanising presses with intent to avoid prohibition imposed by the Import of Goods (Control) Order, 1940; fined £500; Civitas Trading Corporation: Marlborough Street Magistrates' Court (*The Times*, December 1, 1955).

Removal permit. Three men having twelve bottles of American gin in their possession given to them by American airman without a removal permit; each fined £25; Williamson, Fewtrell, Frost: Birmingham Magistrates' Court (*Birmingham Mail*, October 27, 1955).

### *Drugs*

Unauthorised possession. Having about four pounds of raw opium and a pipe for use in connection with the smoking of opium; sentenced to three months' imprisonment; Ching: Liverpool Magistrates' Court (*Liverpool Evening Express*, November 15, 1955).

Unauthorised possession. Drug addict having unauthorised possession of heroin; put on probation for two years with a condition that he resided in hospital for a period up to twelve months; Ashley: Willesden Magistrates' Court (*The Times*, November 22, 1955).

Unauthorised possession. Being in unauthorised possession of Indian hemp; sentenced to eight months' imprisonment; Jalloh: West London Magistrates' Court (*Evening Standard*, November 15, 1955).

### *Firearms, explosives and offensive weapons*

Firearms. Failing to have firearms certificate for a revolver, a 1914–18 war relic; fined £1, revolver ordered to be confiscated; Watts: Brentford Magistrates' Court (*Evening Standard*, November 23, 1955).

Firearms. Possessing a loaded revolver and forty-four rounds of ammunition without a certificate; fined £10; Northeast: Reading Magistrates' Court (*Evening Standard*, November 30, 1955).

Offensive weapon. Being in possession of a stiletto at a public dance; fined £2; Benchoam: Southport Magistrates' Court (*Liverpool Evening Express*, November 11, 1955).

*Larceny, fraud, etc.*

Receiving. Mother receiving stolen property from her children aged twelve and nine; sentenced to fourteen days' imprisonment; Brogan: Nuneaton Magistrates' Court (*Birmingham Evening Despatch*, November 16, 1955).

*Local by-laws*

Shipbuilders. Shipbuilders on Clyde launching ship in fog when visibility less than four hundred yards; fined £2; Harland and Wolff: Glasgow Sheriff's Court (*Evening Standard*, November 30, 1955).

*National assistance*

Persistently failing to maintain himself and his wife and receiving national assistance as a result; sentenced to four months' imprisonment; Spiers: Birkenhead Magistrates' Court (*Liverpool Evening Express*, November 24, 1955).

*National insurance*

Rag-gatherer failing to pay national insurance contributions as a self-employed person; fined £2; Rosney: Birkenhead Magistrates' Court (*Liverpool Evening Express*, November 24, 1955).

*Railways and ships*

Ship. Going on board a vessel without the master's consent or other lawful authority; fined £2; Clarke: Newcastle-upon-Tyne Magistrates' Court (*Liverpool Evening Express*, November 24, 1955).

Disobedient seaman. Fisherman rang ship's telegraph to "stop," turned ship's wheel and sounded siren, putting trawler he was in and the one behind in danger; sentenced to one month's imprisonment; Gardner: Hull Magistrates' Court (*Liverpool Daily Despatch*, November 10, 1955).

Oil. Allowing oil to escape from ship directly into the waters of the port of Southampton; fined maximum penalty of £100; Esso Petroleum Company: Hythe Magistrates' Court (*Manchester Guardian*, December 3, 1955).

Oil. Master allowing oil to be discharged from tanker into the Thames; fined £20; Jewiss: Grays Magistrates' Court (*Evening Standard*, November 11, 1955).

Overloading. Master overloading his ship eleven inches above loading markings; fined maximum fine of £1,200, ordered to pay £10 10s. costs; Costis: Wallasey Magistrates' Court (*Birmingham Mail*, November 28th, 1955).

*Road traffic*

Obstructed view. Farmer driving Land Rover containing fourteen women passengers and with large Labrador dog lying across the bonnet; summoned for driving a vehicle when not in a position to retain a full view of the road ahead and for carrying an excessive number of passengers; fined £5 on the first summons, the second summons dismissed; Woodward: Gravesend Magistrates' Court (*Manchester Guardian*, November 10, 1955).

Driving five-ton mobile crane while under the influence of drink; fined £50, disqualified for driving for ten years; McConnachie: Chichester Magistrates' Court (*The Times*, November 23, 1955).

Driving a steam-roller without due care and attention; fined 7s. 6d., licence endorsed and ordered to pay £2 1s. 6d. costs; Turrell: West London Magistrates' Court (*Manchester Guardian*, November 2, 1955).

Defective car. Not having a proper instrument for giving audible warning of approach attached to car; using an old motor horn like a trumpet, blowing "tally ho" or "reveille" while steering with one hand; fined 10s.; Douglas: Chesterfield Magistrates' Court (*Manchester Guardian*, November 22, 1955).

Licence. Lending licence to another man to enable him to hire a car; previous conviction for similar offence; fined £30, ordered to pay £7 4s. 6d. costs; Waite: Malling Magistrates' Court (*Evening Standard*, November 28, 1955).

Licence. Son using his father's driving licence for four years, renewing it each year in his father's name; summoned for making a false statement in order to obtain a driving licence; fined £10; Whitehead: Chatham Magistrates' Court (*Evening Standard*, November 16, 1955).

Careless driving. Driver putting out left-hand indicator and then passing straight over crossroads; fined £2, licence endorsed and ordered to pay £3 10s. costs; Mark: Beaconsfield Magistrates' Court (*Evening Standard*, November 11, 1955).

Handbrake. Driver failing to set handbrake of bus which crashed into shop; fined £5; West Bromwich Magistrates' Court (*Birmingham Mail*, November 28, 1955).

Handbrake. Failing to set the brake of a car effectively; fined £2; Cottier: Wallasey Magistrates' Court (*Liverpool Evening Express*, November 24, 1955).

Buses. Distracting the attention of a bus driver without reasonable cause; man opened emergency window at back of driver's cab and grabbed driver's arm because he thought his girl friend had fallen off bus; fined £2; Motion: Birmingham Magistrates' Court (*Birmingham Mail*, November 18, 1955).

Driving ban. Disqualification from driving for two years imposed on butcher for dangerous driving in January, 1954, and reduced to one year on appeal, removed with effect from December 1, 1955, to enable butcher to deal with Christmas poultry; Wayt: Enfield Magistrates' Court (*Evening Standard*, November 26, 1955).

Dangerous driving. Driver of coach driving it in such a way that it overturned, twenty-six passengers being injured; fined £10, disqualified for driving for a year; Stanley: Henley-on-Thames Magistrates' Court (*Manchester Guardian,* November 16, 1955).

*Vagrancy*

Begging. Being a vagrant displaying his deformities to the public to obtain alms; fined 10s.; Pell: Liverpool Magistrates' Court (*Liverpool Evening Express*, November 21, 1955).

Street photographer touting for custom; fined £2; Levington: Cheltenham Magistrates' Court (*Gloucester Echo*, November 8, 1955).

## Case and Comment

The reports of cases to which initials are appended hereunder have been specially prepared for *The Criminal Law Review* by the following reporters:—

HENRY PALMER, *Barrister-at-Law.*
J. D. PENNINGTON, *Barrister-at-Law.*

**Accomplice**—*Corroboration of evidence—direction to jury*

R. *v*. ROMA[1] (Court of Criminal Appeal: Lord Goddard C.J., Pearce and Pearson JJ.: November 14, 1955).

R. was convicted of stealing and the jury were asked to return a verdict of Not Guilty on an alternative count of receiving. B., a co-defendant, gave evidence against R. at the trial. On appeal against conviction to the Court of Criminal Appeal, R. contended that the jury were misdirected in law on the question of the corroboration of B.'s evidence. The passage in the summing-up dealing with B.'s evidence was as follows: "The evidence against the accused does depend to some extent upon the evidence of B., who was an accomplice. You are entitled to accept the evidence of an accomplice, but it is desirable that there should be some corroboration"; and later: "You will treat the evidence of B. with very great circumspection because he is an accomplice."

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[1] For the appellant: *H. W. J. Ap Robert* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *Bruce Griffiths* (instructed by C. R. Cradick, Barry).

*Held*, dismissing the appeal, that there was a sufficient warning to the jury of the necessity of the evidence of an accomplice being corroborated, although it would have been better if a stronger expression had been used. It was more usual to say: "It is dangerous to act upon the evidence of an accomplice without corroboration." However, even if this direction was not sufficient, this was a case in which the court would have applied the proviso to section 4 (1) of the Criminal Appeal Act, 1907, because the evidence clearly was corroborated in fact.

*Per* Lord Goddard C.J.: As a matter of practice, where there are alternative counts of stealing and receiving, it is desirable that the jury should be discharged from giving a verdict on the count on which the prisoner is not convicted. If the jury is asked to return a formal verdict of Not Guilty, then the Court of Criminal Appeal would be unable to alter the verdict to a conviction on the alternative count. [H. P.]

COMMENTARY. The rules governing the evidence given by an accomplice on behalf of the prosecution were considered in *Davies* v. *Director of Public Prosecutions* [1954] Crim.L.R. 305. The points relevant to the case under consideration are that it is now a rule of law that the judge must warn the jury that, although they may convict upon the evidence of an accomplice, it is dangerous to do so unless his evidence is corroborated: if the judge fails so to warn the jury the conviction will be quashed unless the proviso to section 4 (1) can be applied.

The dictum of Lord Goddard C.J. follows the principle stated in *R.* v. *Seymour* [1954] Crim.L.R. 475.

See also Archbold, 33rd ed., 199.

**Appeal**—*Appeal against convictions in German-occupied territory —admission alleged to be made under threat*

QUIN *v.* R.[2] (Judicial Committee of the Privy Council: Viscount Simonds, Lords Oaksey and Morton of Henryton: November 9, 1955) (*The Times*, November 10, 1955).

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[2] For the appellants: *Geoffrey Bing Q.C.*, *Mark Smith* (instructed by S. Sidney Silverman). For the Crown: *Frank Gahan Q.C.*, *W. H. Arnold* (Att.-Gen. for Guernsey), *J. G. Le Quesne* (instructed by W. R. J. Hickman & Randall).

The appellants, who were formerly members of the Guernsey police force, were convicted in June, 1942, by the Royal Court of Guernsey on charges of breaking and entering and stealing food and drink from various premises during the German occupation. The main grounds of appeal were first, that by reason of the German occupation the appellants were unable to put forward their real defence, namely, that the offences alleged to have been committed by them were really acts of sabotage, and, secondly, that the appellants' admissions were induced by the production of a letter from the German authorities stating that, if they denied the admissions made by them to the German authorities, the Germans would take proceedings against them.

*Held*, (1) that the first ground was not one of which an appellate court could take cognisance; the remedy, if any, was the prerogative of mercy; (2) that it was the duty of the prosecution to produce to the court the letter on which the appellants relied, when the court would have had to consider whether the appellants' pleas should be withdrawn and the evidence of those who denied the truth of their admissions be accepted. Accordingly, in the case of those appellants who contended that their confessions had been induced by the production of the letter and who had not subsequently admitted the thefts before the court, the convictions should be quashed, but as they were properly convicted on other charges their sentences would not be reduced. [J. D. P.]

**Certiorari**—*Perjury—proceedings affected by perjury*

R. *v.* ASHFORD, KENT, JUSTICES, *ex p.* RICHLEY (No. 2) [3] (Court of Appeal: Singleton, Jenkins and Parker L.JJ.: November 3, 1955) ([1955] 3 W.L.R. 778; [1955] 3 All E.R. 604).

In affiliation proceedings, R., the alleged father of the child, called as a witness X. who he understood had associated with Miss M., the mother. X., however, in evidence denied that he had had sexual intercourse with Miss M., and the justices made an affiliation order against R. R. appealed to quarter sessions who dismissed the appeal. R. then laid an information against X. charging him with perjury. At the trial X. called Miss M. who denied that she had had intercourse with X. X. was convicted of perjury. An application by R. to the Divisional Court for an order of certiorari to quash the justices' order, on the ground that the order had been procured by fraud, the application was refused. On appeal:—

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[3] For the Crown: *Frank Whitworth* (instructed by Kingsford, Dorman & Co. for Kingsford, Flower & Pain, Ashford). For Miss M.: *John Gower* (instructed by Lovell, Son & Pitfield for W. Taylor & Co., Ashford).

*Held*, dismissing the appeal, that the remedy of certiorari to quash an order on the ground of fraud should not be invoked unless the fraud was clear and manifest; in the present case, the fact that X. was convicted of perjury did not establish guilt on the part of Miss M. and unless she committed perjury or was in some way a party to fraud certiorari ought not to be granted.

*Per* Jenkins L.J.: Without attempting to lay down any general rule, I think that an order of certiorari to quash proceedings on the ground that they were procured by fraud or perjury should seldom if ever be made unless the facts regarding the alleged fraud or perjury have either been the subject of a conviction in criminal proceedings against the person to whom the fraud or perjury is imputed, or else have been admitted by something amounting to a confession by such person. [J. D. P.]

**Courts-Martial**—*Jurisdiction—investigation of charge by "commanding officer"—application of Judges' Rules*

R. *v.* HARRIS-RIVETT[4] (Courts-Martial Appeal Court: Lord Goddard C.J., Pearce and Pearson JJ.: November 7, 1955) ([1955] 3 W.L.R. 823; [1955] 3 All E.R. 567).

H., a Lieutenant-Colonel, was convicted by a general court-martial in Berlin of an offence of an indecent character with a civilian in Berlin, and was sentenced to be cashiered. H. had been arrested at Warminster and taken to Berlin in custody in order to be tried there. He now appealed to the Courts-Martial Appeal Court on the grounds (i) that the court in Berlin had no jurisdiction and (ii) that the Judges' Rules had not been complied with. H. contended, on the first ground of appeal, that by virtue of sections 45 and 46 of the Army Act, the charge must first be investigated by the accused person's commanding officer, and that this ought to have been done by H.'s commanding officer at Warminster, and not, as was the fact, by H.'s commanding officer in Germany, under whose command H. was only by virtue of being taken to Germany under arrest.

*Held*, dismissing the appeal, that it would be absurd if a commanding officer at Warminster were to go through the serious matter of investigating an offence which was alleged to have been committed against a civilian in Germany. The Act did not say what commanding officer was to investigate the charge; the person who was the commanding officer at the material moment would not necessarily be the commanding officer who carried out the investigation. If the charge against H. had not been investigated by any commanding officer, that might have affected the jurisdiction, though the court was not deciding the point. As regards the second ground of appeal, it was a matter for the Army Council to decide whether the Judges' Rules were to be applied to courts-martial, although ordinarily the rules of evidence applying to a civilian case applied to a court-martial. One difficulty of applying the Rules to military men was that they were under discipline and obliged to obey the orders of their superior officers. It might well be that they could not be applied without some qualification, but in any event the evidence in this case was properly admitted because there was a voluntary statement by H. The appeal would, therefore, be dismissed on both grounds. [H. P.]

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[4] For the appellant: *Brian Clapham* (instructed by Messrs. Eland, Hore, Pattisson, Nettleship & Butt). For the Crown: *E. Garth Moore* (instructed by the Director, Army Legal Services).

COMMENTARY. Section 45 (5) of the Army Act, 1881, provides: "The charge made against every person taken into military custody shall without unnecessary delay be investigated by the proper military authority, and, as soon as may be, either proceedings shall be taken for punishing the offence, or such persons shall be discharged from custody."

**Evidence**—*Corroboration.* See R. v. ROMA, p. 46, above.

**Extradition**—*Fugitive offender—habeas corpus—alleged embezzlement of £6*

*Re* CLEMETSON [5] (Q.B. Divisional Court: Hallett and Pearce JJ.: November 22, 1955) (*The Times*, November 23, 1955).

C., a student nurse in this country, was committed to prison by the magistrate at Bow Street under the Fugitive Offenders Act, 1881, to await her return to Jamaica for alleged offences of embezzlement. On an application by C. for a writ of habeas corpus, her counsel stated that she was employed as an assistant post-mistress and countersigning clerk at a post office in Jamaica and that the prosecution had alleged that whereas she should have entered two sums of £2 and two sums of £1 in the books, she kept them for herself. In her affidavit C. said that she was innocent of the charges alleged against her and that before she left Jamaica she sent the sum of £6, the amount involved in the charges, to the police. It was submitted that although the nature of the case might not be "trivial" within the meaning of section 10 of the Act of 1881, it came within the word "otherwise" in that section, which meant that in all the circumstances it would be harsh and oppressive to send C. back to Jamaica.

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[5] For the applicant: *Robin Simpson* (instructed by Kingsley, Napley & Co.) for Colonial Office; *John Mathew* (instructed by Charles Russell & Co.).

*Held,* that notwithstanding the amount involved, this was a matter which ought to be inquired into and the court ought not to prevent such inquiry taking place in Jamaica; accordingly, the application would be dismissed. [J. D. P.]

COMMENTARY. By section 10 of the Fugitive Offenders Act, 1881, a superior court may discharge a fugitive "by reason of the trivial nature of the case, or by reason of the application for the return of a fugitive not being made in good faith in the interests of justice or otherwise."

For recent cases in which the discretion given by this section has been exercised, see *R.* v. *Governor of Brixton Prison, ex p. McCheyne* [1951] 1 T.L.R. 1155; *R.* v. *Governor of Brixton Prison, ex p. Penn* (1952) 96 S.J. 696.

### **Factories**—*Breach of regulations—criminal liability—person killed not employed by defendant company*

STANTON IRONWORKS CO. *v.* SKIPPER [6] (Q.B. Divisional Court: Lord Goddard C.J., Ormerod and Barry JJ.: October 27, 1955) ([1955] 3 W.L.R. 752; [1955] 3 All E.R. 544).

The appellant company were the occupiers of a factory to which regulations for the use of locomotives and wagons made under the Factory and Workshop Act, 1901, applied. An engine driver who was shunting wagons on the premises, having whistled, proceeded to shunt up the track to a slag crusher. S. who was employed as a lorry driver by merchants to whom the company sold slag, was driving his lorry across the track on which the wagons were being shunted when the wagons collided with the lorry and S. was killed. On a charge against the company under section 133 of the Factories Act, 1937, for having contravened regulation 14 of the regulations, the justices found that the locomotive was pushing more than one wagon whereby risk of injury might be caused to persons employed on the factory premises, that no one accompanied or preceded the front wagon and no other efficient means were taken to obviate risk of injury to persons employed; accordingly, they found the company in breach of regulation 14 and therefore liable to a penalty under section 133. The company appealed.

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[6] For the company: *M. V. Argyle* (instructed by Carpenters for G. Keogh & Co., Nottingham). For the prosecutor: *S. B. R. Cooke* (instructed by the Solicitor, Ministry of Labour and National Service).

*Held*, dismissing the appeal, that the regulation was broken if the company had not taken efficient means to guard against danger to their employees even though no employee was in fact injured, and since, as a result of the breach, a person, albeit not an employee, was killed, the company were liable to a penalty under section 133. [J. D. P.]

COMMENTARY. The point of importance in this case is that the company were criminally liable irrespective of whether the person killed was employed by the company or not. Indeed the decision of the Divisional Court was given on the assumption that the company did not owe a duty under the regulation towards a person not employed by them. This was in accordance with *Hartley* v. *Mayoh & Co.* [1954] 1 Q.B. 383, where it was held that civil liability for breach of a statutory regulation passed for the benefit of servants could not be placed upon occupiers of a factory in respect of a person not employed by them.

**Forgery**—*Sentence.* See R. *v.* HEAD, p. 60, below.

**Habeas Corpus**—*Fugitive offender.* See *Re* CLEMETSON, p. 50, above.

**Indecent Assault**—*Motive—stealing shoe*

R. *v.* GEORGE [7] (Lincoln Assizes: Streatfeild J.: November 3, 1955).

The defendant was charged on an indictment containing four counts, two of which charged him with indecent assault, each assault being alleged to have been committed on a different date and on a different girl. Each of the other two counts charged him with attempted larceny of a shoe belonging to the respective girls. On each of the counts charging indecent assault the defendant pleaded Guilty to common assault, and Not Guilty on the other counts. Counsel for the prosecution said that he was unwilling to accept those pleas. The depositions, which included statements by the defendant, showed that on each occasion the defendant had attempted to remove the girl's shoe from her foot, and that he did this because it gave him a kind of perverted sexual gratification. Counsel for the prosecution submitted that there was authority for the proposition that an assault was indecent if it was committed to gratify an indecent motive in the mind of the defendant, even though there were no overt circumstances of indecency.

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[7] For the prosecution: *J. Malcolm Milne* (instructed by L. W. Heeler, Town Clerk, Grimsby). For the defendant: *W. Percival Grieve* (instructed by E. D. Tyssen Drakes, Grimsby).

Streatfeild J. said that he would rule that an assault became indecent only if it was accompanied by circumstances of indecency towards the person alleged to have been assaulted, and that neither of the assaults in the present case could possibly amount to an indecent assault. Counsel for the prosecution said that, in view of that ruling, he would accept the plea to common assault and would not proceed on the counts charging attempted larceny.

The defendant, who had previous convictions in magistrates' courts for similar offences, and who refused to submit to any kind of medical treatment, was sentenced to concurrent terms of twelve months' imprisonment.

[T. R. Fitzwalter Butler, *Barrister-at-Law.*]

COMMENTARY. An indecent assault is an assault " accompanied with circumstances of indecency on the part of the prisoner towards the person assaulted " (Archbold, 33rd ed., 1103, approved, *Beal* v. *Kelley* (1951) 35 Cr.App.R. 128). The question has been raised whether an indecent act is essential, or whether an act decent in itself but committed with an indecent aim will suffice. There are conflicting views on this, see *e.g., R.* v. *Culgan* (1898) 19 N.S.W.L.R. 166 (trying to drag prosecutrix to a place where accused could have intercourse with her *not* indecent assault); *R.* v. *Abrahams* [1918] 3 S.A.L.R. 590 (accused caught hold of girl by the arm and used filthy expression *not* indecent assault), but in *R.* v. *Chong* (1914) 32 O.L.R. 66 (man took hold of girl against her will and invited her to go with him for immoral purpose offering her money, indecent assault) and *R.* v. *Baker* (1875) *The Times,* July 30, August 2, Lord Esher, the opposite view was taken.

### **Indictment**—*Count based on inadmissible evidence—meaning of " facts or evidence "*

R. *v.* DELGARNO [8] (Bedfordshire Quarter Sessions: C. L. Henderson, Esq., Q.C., Chairman: November 14, 1955).

The accused had been charged with receiving stolen property contrary to section 33 of the Larceny Act, 1916. At the committal proceedings before the justices the only evidence against the accused was contained in statements made to the police by two other prisoners charged with stealing the property alleged to have been received by the accused. At the committal proceedings the prosecution conceded that such evidence was not admissible against the accused, and that, accordingly, there was no evidence before the justices on which they could commit the accused for trial. They had, however, properly committed her for trial on various other offences. The accused was indicted on several counts in respect of these other offences, but the prosecution also included a count in respect of the offence in question. Counsel for the defence objected to the inclusion of this count in the indictment on the ground that it did not comply with the provision of section 2 of the Administration of Justice (Miscellaneous Provisions) Act, 1933. The prosecution contended that the count was rightly included in view of the wide words of the proviso to subsection (2) of that section which are: " . . . where the person charged has been committed for trial, the bill of indictment against him may include . . . any counts founded on facts or evidence disclosed in any examination or deposition taken before a justice . . ." The prosecution argued that the count was founded on the fact of the existence of a statement by the fellow-prisoners which could be proved in evidence against the accused and would be properly admissible against her if (as was anticipated) the two fellow-prisoners pleaded guilty to the charge of stealing and were then called as witnesses for the prosecution. There was considerable argument as to the possible distinction between the words " facts or evidence."

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[8] For the prosecution: *Niall MacDermot* (instructed by Lathom & Co.). For the defendant: *T. H. K. Berry* (instructed by Austin & Carnley, Luton).

*Held*, that evidence clearly meant *admissible* evidence, which the prosecution conceded did not exist in this case. The court did not accept the argument of the prosecution that " facts " might include something wider than evidence, and, accordingly, they would not allow the inclusion of the count in the indictment and would uphold the submission of the defence.

[F. Maurice Drake, *Barrister-at-Law.*]

### **Jury**—*Verdict—ambiguity*

R. *v.* SALAVIN [9] (Court of Criminal Appeal: Hallett, Pearce and Pearson JJ.: November 21, 1955).

S. was tried at Surrey Quarter Sessions on a charge of breaking and entering a dwelling-house with intent to commit a felony therein, and the felony, by the particulars, was murder or, in the alternative, grievous bodily harm. The verdict of the jury was taken as follows: "The Clerk of the Peace: Do you find the prisoner guilty or not guilty of burglary with intent to murder or to do grievous bodily harm? The Foreman: We take it there is another charge. The Clerk of the Peace: Do you find him not guilty? The Foreman: Not guilty. The Clerk of the Peace: Do you find him guilty or not guilty of entering by night the house of V. with intent to commit felony? The Foreman: Yes. The Clerk of the Peace: Guilty? The Foreman: Guilty. The Clerk of the Peace: That is the verdict of you all? The Foreman: Yes. May we add a rider." The foreman then added a rider that the prisoner did so under severe mental strain. The trial then proceeded in the normal way until S. was asked if he had anything to say why the court should not pass sentence upon him. S. then said that, as he understood it, he had been found not guilty. The following dialogue then took place: "The Chairman (to the jury): You said not guilty to breaking and entering? The Foreman: And with the intent therein to commit murder, but we did agree it was to commit a felony. The Chairman: What felony? The Foreman: Causing grievous bodily harm." S. appealed to the Court of Criminal Appeal against his conviction on the ground that the verdict of the jury was ambiguous.

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[9] For the appellant: *R. Simpson* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *J. B. R. Hazan* (instructed by the Solicitor, Metropolitan Police).

*Held,* dismissing the appeal, that in order to get a complete and satisfactory verdict it was necessary for the jury to state on which intent of the two they found S. guilty, and if the verdict was ambiguous, it was the duty of the deputy chairman to elucidate it by suitable questions to the jury. Although in a rather unusual way and mainly at the instance of S. himself, the ambiguity had been elucidated at the trial, and the appeal would, therefore, be dismissed. [H. P.]

COMMENTARY. For a case in which the Court of Criminal Appeal quashed a verdict for ambiguity, see *R.* v. *Hawkes* (1931) 22 Cr.App.R. 172: see further Archbold, 33rd ed., 211.

**Larceny**—*Alternative count of receiving.* See R. *v.* ROMA, p. 46, above.

**Perjury**—*Certiorari to quash proceedings affected by.* See R. *v.* ASHFORD, KENT, JUSTICES, *ex p.* RICHLEY, p. 48, above.

**Prisons**—*Prisoner attacked by other prisoners—liability of Prison Commissioners*

D'ARCY *v.* PRISON COMMISSIONERS [10] (Queen's Bench Division: Barry J. and a jury: November 16, 1955) (*The Times*, November 17, 1955).

D., while serving a term of imprisonment at Parkhurst Prison, was attacked by three fellow-prisoners and was slashed with a weapon on the face and neck. He brought an action against the Prison Commissioners claiming damages for negligence.

Barry J. directed the jury that the law did not presume that the Commissioners ensured the safety of each prisoner, and the mere fact that one prisoner attacked another did not of itself indicate any negligence by the authorities. D., however, was entitled to as much damages as any law-abiding citizen if he proved his case.

The jury found in favour of D., and assessed the damages at £200. They found, however, that D. was 5 per cent. to blame, and judgment was entered for D. for £190 with costs. [J. D. P.]

COMMENTARY. The most recent consideration of liability for injury to a prisoner was a brief one in *Ellis* v. *Home Office* [1953] 2 Q.B. 135. Jenkins L.J. there said: "The mere fact that the plaintiff, while in prison, was attacked and injured by a fellow prisoner does not entitle him to succeed against the government department responsible for the management of the prison. . . . He must show that the injury which he sustained was due to some breach of duty on the part of those responsible for the management of the prison." The plaintiff in that case alleged breach of the Prison Rules and common law negligence. He failed on both grounds, but the case was notable because of the Crown privilege claimed for certain documents and reports prepared at the prison and by the police, and the criticism of this claim by Devlin J. and the Court of Appeal.

**Prisons**—*Rules—whether ultra vires—special treatment for preventive detainees*

SILVERMAN *v.* PRISON COMMISSIONERS [11] (Court of Appeal: Singleton, Jenkins and Parker L.JJ.: November 1, 1955) (*The Times*, November 2, 1955).

S. was sentenced at the Central Criminal Court to ten years' preventive detention, and in accordance with rule 161 of the Prison

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[10] For the plaintiff: *Marven Everett Q.C., David Pennant* (instructed by Graeme Kemp, Cardiff). For the Commissioners: *G. G. Baker Q.C., Rodger Winn, Aubrey Warshaw* (instructed by the Treasury Solicitor).

[11] The plaintiff appeared in person. For the Commissioners: *Rodger Winn* (instructed by the Treasury Solicitor).

Rules, 1949, made under section 52 of the Criminal Justice Act, 1948, the Commissioners caused him to be detained in Wandsworth Prison for one year. The rule provided that a prisoner in the first stage of preventive detention should be treated in all respects under the rules applicable to prisoners serving a sentence of imprisonment. The rule made no provision for special treatment as required by section 52. S., contending that the legislature had meant persons sentenced to preventive detention to be treated more favourably than persons serving sentences of imprisonment, brought an action for a declaration that rule 161 was *ultra vires*.

*Held*, affirming the decision of Streatfeild J. [1955] Crim.L.R. 116, that, looking at the whole scheme covered by the Act of 1948, rule 161 was not outside its scope and was not *ultra vires*. [J. D. P.]

**Receiving**—*Alternative count of stealing*. See R. *v*. ROMA, p. 46, above.

**Receiving**—*Direction to jury*

R. *v*. RICHARDS[12] (Court of Criminal Appeal: Lord Goddard C.J., Pearce and Pearson JJ.: October 31, 1955).

R. was convicted at Cornwall Quarter Sessions of receiving stolen metal and was put on probation. On appeal to the Court of Criminal Appeal against his conviction he contended that the chairman misdirected the jury in law. The passage complained of was as follows: " You must decide whether the story of complete innocence is one that you can accept, and if you can accept it, if you do feel it is thoroughly explained and leaves you with no doubt, you may acquit him. If, however, you feel that the prosecution's case has been made out beyond a reasonable doubt, then it is your duty to find him guilty."

*Held*, allowing the appeal, that the jury were misdirected. The proper direction is, if a man is found in possession of property recently stolen, then if he gives no explanation, that is evidence from which a jury may infer that he received it knowing it to be stolen. If he does give an explanation, the jury must consider it, but if the explanation leaves them in doubt as to whether the receipt was innocent or not, the prisoner must be acquitted, because the prosecution then will not have made out their case. This case was not one in which the proviso to section 4 (1) of the Criminal Appeal Act, 1907, ought to be applied, and the conviction would, therefore, be set aside. [H.P.]

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[12] For the appellant: *A. L. Mildon* (instructed by C. W. L. Jervis, Penzance). For the Crown: *T. R. Fitzwalter Butler* (instructed by Stephens & Scown, St. Austell).

COMMENTARY. The form of summing up in receiving cases was recently considered in *R.* v. *Hepworth and Fearnley* [1955] Crim.L.R. 576, which is authority for the form enunciated in the decision in this case. See also [1955] Crim.L.R. 464.

**Road Traffic**—*Accident—notice of intended prosecution—service*

SANDLAND *v.* NEAL [13] (Q.B. Divisional Court: Lord Goddard C.J., Ormerod and Barry JJ.: November 4, 1955) ([1955] 3 W.L.R. 689; [1955] 3 All E.R. 571).

The defendant was involved in a car accident and was removed to hospital, where he was detained for two months. A police officer saw the defendant in hospital on the day of the accident and again ten days later, but formed the view that the defendant was incapable of appreciating what was being said to him on those occasions, and that to have served a notice of intended prosecution personally on him would, having regard to his condition, have been improper and unwise. Instead, having ascertained that the defendant's wife was living at the defendant's usual residence, the police officer sent the notice by registered post addressed to the defendant at his home, where it was received within the statutory period of fourteen days from the date of the accident. The notice was not received personally by the defendant until after the expiration of fourteen days. On an information charging the defendant with dangerous driving, the justices, being of the opinion that the notice had not been properly sent to the defendant in accordance with the requirement of section 21 (*c*) of the Road Traffic Act, 1930, dismissed the information. The prosecutor appealed.

*Held,* Barry J. dissenting, allowing the appeal, and distinguishing *Holt* v. *Dyson* [1951] 1 K.B. 364, that it was the sending of the notice and not the receipt that was decisive, and the requirements of section 21 were fulfilled if the notice was sent to the alleged offender wherever it was most likely to come to his attention within the specified time. [J. D. P.]

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[13] For the prosecutor: *Frank D. Paterson* (instructed by Kinch & Richardson for Percy Hughes & Roberts, Birkenhead). For the defendant: *Gordon Clover* (instructed by Carpenters for Laces & Co., Liverpool).

COMMENTARY. The requirement contained in section 21 (*c*) is that the notice should be "served on or sent by registered post to" the accused. The essential matter is that the police should act reasonably; they were held in *Holt* v. *Dyson*, above, not to have acted reasonably.

### **Road Traffic**—*Drunk in charge of a vehicle—two persons in charge of the same car*

POLICE *v*. LIVERSIDGE AND FEATHERSTONE [14] (Sheffield Magistrates' Court: J. H. Bingham, Esq., Chairman: September 29, 1955).

The two defendants were charged separately with being drunk in charge of a motor-vehicle, the motor-vehicle being the same one in each case. A police officer had seen a stationary motor-vehicle on a road around which a large crowd had gathered. He went up to the car and saw the defendant Featherstone in the driver's seat with one hand on the steering wheel, arguing through the open window of the car with a man in the road. As the officer approached, Featherstone opened the car door and got out of the car. Upon releasing his hold of the car door he staggered and almost fell to the ground. The officer had to support him, and while doing so became aware that he smelt strongly of liquor and concluded that he was under the influence of drink to such an extent as to be incapable of having proper control of the vehicle. He told Featherstone to remain seated in the car, noticing at the same time that another man occupied the passenger seat behind the driver's seat. He then went away to telephone divisional headquarters. Upon returning to the car a few minutes later he saw that Featherstone was in the seat formerly occupied by the passenger Liversidge, who was now in the driving seat holding the steering wheel and attempting to operate the gear lever. The officer asked who had been driving, whereupon Liversidge replied: "It's my car—I'm responsible." A police inspector then arrived and asked the two men who was the driver of the car. Liversidge replied: "I am," and the inspector then instructed him to get out of the car. Liversidge did so, staggered badly and was almost unable to stand unaided. It was noticed that he, too, smelt strongly of intoxicating liquor.

Both defendants pleaded guilty. Each was fined £20, ordered to pay £2 10s. costs and disqualified for holding or obtaining a driving licence for one year.

[Leslie M. Pugh, *Clerk to the Justices*.]

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[14] For the prosecutor: H. R. Howe, Solicitor. For the defendants: K. I. Mitchell, Solicitor.

**Sentence**—*Forgery—forging railway tickets*

R. *v.* HEAD [15] (Court of Criminal Appeal: Lord Goddard C.J.: Pearce and Pearson JJ.: November 8, 1955) (*The Times*, November 9, 1955).

H. was convicted at East Sussex County Sessions on charges of forging railway tickets and sentenced to six months' imprisonment. She applied to the Court of Criminal Appeal for leave to appeal against her sentence. It was contended on her behalf that the sentence was too severe. The court was told that H. was eighteen years of age, of good character, and at the time of the offences was separated from her family, to whom she was devoted. She had forged the railway tickets in order to be able to visit her family.

*Held,* dismissing the application, that H. had forged railway tickets on four different occasions over a period of nine months, and the forgeries were carried out with a good deal of skill and forethought. The Quarter Sessions had taken all the relevant factors into consideration and it was not possible for the Court of Criminal Appeal to interfere. [H. P.]

**Solicitors**—*Striking off the roll—criminal conviction—indirect appeal against conviction*

*Re* A SOLICITOR (House of Lords: Lords Morton of Henryton, Radcliffe and Tucker: November 24, 1955) (*The Times*, November 25, 1955).

A petition for leave to appeal against the decision of the Court of Appeal, affirming that of the Divisional Court of the Queen's Bench Division ([1955] Crim.L.R. 790), was dismissed by the Appeal Committee sitting *in camera.*

**Trial**—*Receiving.* See R. *v.* RICHARDS, p. 57, above.

**Trial**—*Verdict.* See R. *v.* SALAVIN, p. 54, above.

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[15] For the applicant: *Peter Boydell* (instructed by Waterhouse & Co. for George Coleman & Son, Hayward's Heath).

# Acts and Orders

## Agriculture

FERTILISERS AND FEEDING STUFFS REGULATIONS, 1955 (S.I. No. 1673); operative January 1, 1955. The Regulations of 1932 (S.R. & O. No. 658), as amended, are revoked and replaced. Changes are made in the limits within which mis-statements as to quality and content are not actionable under sections 2 (5) and 26 (5) of the Fertilisers and Feeding Stuffs Act, 1926 (regulation 5), in the manner of taking samples (regulation 6) and in the methods of analysis of samples of fertilisers and feeding stuffs (regulations 14, 15). Schedules 1, 2 and 4 of the Act of 1926 are altered in regard to the particulars required to be given by a seller in respect of certain articles and the definitions implied on the sale of certain articles; fertilisers and feeding stuffs which have come into general use since 1932 are made subject to the schedules (regulation 18).

For penalties for contraventions, see section 19 of the Act of 1926.

See MILK (SPECIAL DESIGNATIONS) (SPECIFIED AREAS) (NO. 2) ORDER, p. 63, below; MILK (GREAT BRITAIN) (AMENDMENT) ORDER, p. 64, below.

## Birds

See WILD BIRDS (BARNACLE GEESE IN WESTERN ISLES) ORDER, p. 66, below.

## British Commonwealth

MUSCAT ORDER, 1955 (S.I. No. 1641): operative December 1, 1955. The Order in Council of 1949 (S.I. No. 594) is repealed and partially re-enacted, effect being given to new arrangements regarding the exercise of Her Majesty's jurisdiction in the State of Muscat and Oman. The Order concerns certain criminal matters including committal for trial, jurisdiction, bail, execution of sentence, security for good behaviour and deportation (articles 21–31); appeals (articles 32–41); appeals to the Privy Council (articles 64–67); complaints in criminal cases by persons not subject to the Order against persons subject to it (article 68); and inquests (articles 41–46).

The Political Resident has power to make Regulations for the peace, order and good government of persons subject to the Order (see article 8) and any person contravening such a regulation will be liable to any punishment prescribed therein or, if no punishment is prescribed, to imprisonment for a period not exceeding two years or to a fine not exceeding 1,500 rupees or both (articles 81, 82).

COCOS ISLANDS ORDER IN COUNCIL, 1955 (S.I. No. 1642): operative November 23, 1955. On November 23, 1955, the Cocos Islands ceased to form part of the Colony of Singapore and were placed under the authority of the Commonwealth of Australia. Any criminal proceedings pending on that day in the Supreme Court of Singapore or in the Court of Criminal Appeal of Singapore are to be carried on and concluded as nearly as may be as if the present Order had not been made.

ADEN COLONY (AMENDMENT) ORDER, 1955 (S.I. No. 1654): operative on a day to be appointed. The Legislative Council of Aden is reconstituted. Any person who sits or votes in the Council knowing or having reasonable grounds for knowing that he is disqualified for doing so, is liable to a penalty not exceeding four hundred shillings for every day upon which he so sits or votes. Provision is made for the determination and regulation of the privileges, immunities and powers of the Council and its members.

See MERCHANT SHIPPING (CONFIRMATION OF LEGISLATION) (ADEN) ORDER, p. 64, below.

## Coroners

CORONERS ACT, 1954 (COMMENCEMENT) ORDER, 1955 (S.I. No. 1667): operative November 21, 1955. The Coroners Act, 1954 (see [1954] Crim.L.R. 641) came into operation on November 21, 1955.

CORONERS (FEES AND ALLOWANCES) RULES, 1955 (S.I. No. 1668): operative November 21, 1955. The fees and allowances to be paid to medical practitioners for making post-mortem examinations and to witnesses at inquests are prescribed.

A medical practitioner who makes a post-mortem examination at a coroner's direction or request and reports its results to the coroner but is not a witness at an inquest is to be paid four guineas; if he is a witness at an inquest he is to be paid six guineas in respect of the examination and of the first day on which he attends to give evidence, and a further fee of three guineas for each subsequent day on which he attends to give evidence. Where a medical practitioner attends to give evidence at more than one inquest held on the same day on the deaths of two or more persons which appear to have been caused by the same occurrence, he shall be paid four guineas for each post-mortem examination and three guineas in respect of each day on which he attends to give evidence at such inquests. In all other cases where a medical practitioner attends an inquest to give professional evidence the fee to which he is entitled is three guineas for each day, provided that if he attends to give evidence at more than one inquest held on the same day, his fee shall be two guineas in respect of his attendance at each inquest held on that day other than the first.

The allowances to be paid to other witnesses are the same as those prescribed by the Witnesses' Allowances Regulations, 1955 (see p. 66, below), except that no special provision is made for seamen and interpreters.

### Customs and Excise

IMPORT DUTIES (EXEMPTIONS) (NO. 10) ORDER, 1955 (S.I. No. 1669): operative November 7, 1955. Stoned dates are exempted from the general *ad valorem* duty chargeable under section 1 of the Import Duties Act, 1932.

### Emergency Laws

CONTROL OF TRADE BY SEA (REVOCATION) ORDER, 1955 (S.I. No. 1767): operative December 1, 1955. Orders of 1939 (S.R. & O. No. 1671) and 1940 (S.R. & O. No. 90), which prohibited certain ships from proceeding to sea except under the authority of licences granted by the Minister of Transport and Civil Aviation or other prescribed persons, are revoked.

### Food and Drugs

FOOD AND DRUGS ACT, 1955 (4 Eliz. 2, c. 16): operative on a day to be appointed. The Food and Drugs Act, 1938, the Food and Drugs (Milk, Dairies and Artificial Cream) Act, 1950, and the Food and Drugs Amendment Act, 1954 (see [1955] Crim.L.R. 50), and other enactments amending Part V of the Act of 1938 in relation to slaughterhouses and knackers' yards are consolidated.

MILK (SPECIAL DESIGNATIONS) (SPECIFIED AREAS) (NO. 2) ORDER, 1955 (S.I. No. 1715): operative December 6, 1955. In the areas specified in the schedule to the Order special designations must be used for the purpose of all sales of milk by retail for human consumption, other than catering sales.

The provisions of the Order are enforceable by the food and drugs authorities within the areas specified. For penalties for contraventions, see section 79 of the Food and Drugs Act, 1938.

MILK (GREAT BRITAIN) (AMENDMENT) ORDER, 1955 (S.I. No. 1779): operative December 1, 1955. The maximum price of certain milk is raised during December, January and February. No specific maximum price is prescribed for Kosher and Kedassia milks and the seller of such milks may now charge a reasonable amount in addition to the usual price of such milks when they have been duly prepared and labelled.

For penalties for contraventions, see regulation 92 of the Defence (General) Regulations, 1939.

### International Law

EUROPEAN COAL AND STEEL COMMUNITY ACT (COMMENCEMENT) ORDER, 1955 (S.I. No. 1640): operative October 29, 1955. The European Coal and Steel Community Act, 1955 (see [1955] Crim. L.R. 582) came into operation on October 29, 1955.

INTERNATIONAL ORGANISATIONS (IMMUNITIES AND PRIVILEGES OF THE WORLD HEALTH ORGANISATION) (AMENDMENT NO. 2) ORDER, 1955 (S.I. No. 1210): operative September 22, 1955. The immunities and privileges granted by article 8 of the Diplomatic Privileges (World Health Organisation) Order in Council, 1949 (S.I. No. 136) are extended to representatives of the governments of associate members of the organisation.

### London

The following Orders have been made detailing prescribed routes: S.I. 1955 Nos. 1630 (Mitcham); 1702, 1760 (Westminster); 1703 (Hammersmith); 1758 (Kensington); 1759 (Finsbury).

The following Order has been made prohibiting waiting: S.I. 1955, No. 1704 (Bank Street and Dorset Street, Sevenoaks).

The following Order has been made concerning St. James's Park and Green Park: S.I. 1955, No. 1698.

The following Order has been made concerning Hyde Park· S.I. 1955, No. 1750.

### Merchant Shipping

MERCHANT SHIPPING (CONFIRMATION OF LEGISLATION) (ADEN) ORDER, 1955 (S.I. No. 1653): operative November 4, 1955. Certain provisions of the Merchant Shipping Act, 1894, are repealed in their application to British ships registered in Aden by the Merchant Shipping (Amendment) Ordinance, 1955, of that colony.

MERCHANT SHIPPING (LOAD LINE CONVENTION) (VARIOUS COUNTRIES) ORDER, 1955 (S.I. No. 1649): operative November 4, 1955. Czechoslovakia and Turkey have acceded to the Load Line Convention.

See CONTROL OF TRADE BY SEA (REVOCATION) ORDER, p. 63, above.

## Road Traffic

ROAD VEHICLES (REGISTRATION AND LICENSING) REGULATIONS, 1955 (S.I. No. 1664): operative November 17, 1955. The Regulations of 1953 (S.I. No. 231), as amended, are revoked and replaced with certain further amendments. The declarations to be made and particulars to be furnished with regard to the licensing and registration of mechanically propelled vehicles are prescribed by separate Regulations (see below). Where certain agricultural vehicles and other vehicles used on public roads to only a limited extent are drawing other vehicles it is sufficient if the rearmost vehicle exhibits the registration mark of a vehicle of these classes in the same ownership as the drawing vehicle (regulation 23 (2)). Councils are no longer required to supply to the Postmaster-General particulars as to vehicles fitted with wireless sets.

For penalties for contraventions, see section 25 (4) of the Vehicles (Excise) Act, 1949.

ROAD VEHICLES (EXCISE) (PRESCRIBED PARTICULARS) REGULATIONS, 1955 (S.I. No. 1665): operative November 17, 1955. The particulars to be furnished and declarations to be made under the Vehicles (Excise) Act, 1949, and the Road Vehicles (Registration and Licensing) Regulations, 1955 (see above), upon applications for excise licences for, or in connection with the licensing or registration of, mechanically propelled vehicles are prescribed.

For penalties for contraventions, see section 25 (4) of the Vehicles (Excise) Act, 1949.

ROAD VEHICLES (INDEX MARKS) (AMENDMENT) REGULATIONS, 1955 (S.I. No. 1666): operative November 17, 1955. Additional index marks are allotted to county councils for vehicles registered under the Vehicles (Excise) Act, 1949.

### Salmon and Freshwater Fisheries

DEVON RIVER BOARD (FIXED ENGINES) ORDER, 1955 (S.I. No. 1763): operative November 23, 1955. The Order of 1954 (S.I. No. 657, [1954] Crim.L.R. 562), which enabled the Devon River Board, with the approval of the Minister of Agriculture, Fisheries and Food to erect and work fixed engines to catch salmon and migratory trout for artificial propagation and scientific purposes, is revoked and replaced. Nothing in section 36 (1) (*a*) of the Salmon and Freshwater Fisheries Act, 1923, prevents the river board from placing in any inland water any device whatsoever to catch or obstruct for the above purposes non-migratory trout descending a river.

### Scotland

*Birds*

WILD BIRDS (BARNACLE GEESE IN WESTERN ISLES) ORDER, 1955 (S.I. No. 1751): operative November 18, 1955. Except on Sundays and Christmas Day, barnacle geese may be killed or taken in the Western Isles outside the close season, which is the period in any year commencing on February 1 and ending on November 30. No form of decoy may be used.

For penalty for contravention, see section 12 (2) of the Protection of Birds Act, 1954 ([1954] Crim.L.R. 638).

### Witnesses

WITNESSES' ALLOWANCES REGULATIONS, 1955 (S.I. No. 1655): operative November 21, 1955. The allowances payable to witnesses are prescribed, special provision being made for such witnesses as expert witnesses, seamen and interpreters. The Regulations of 1948 (S.I. No. 1909) and 1954 (S.I. No. 1626; [1955] Crim.L.R. 129) are revoked and replaced. The principle change is that the limit of the allowance to a witness practising as a member of the legal or medical professions, or as a dentist or veterinary surgeon for attending to give professional evidence, whether in one or more cases, is raised to six guineas a day. If such a witness attends to give evidence in one case only, and the period during which he is necessarily absent from his place of residence or practice does not exceed four hours, the limit of his allowance is raised to three guineas, unless he necessarily incurs expense in providing someone to take care of his practice during his absence (r. 2).

See CORONERS (FEES AND ALLOWANCES) RULES, p. 62, above.

# *Letters to the Editor*

## Committals to Assizes and Quarter Sessions

Sir,

Your correspondent quoted in your November editorial [1955] Crim. L.R. 665 has made an important omission when stating the power of magistrates to commit to assizes instead of to quarter sessions. To those mentioned by him, there is in section 11 of the Magistrates' Courts Act, 1952, the additional ground of " serious inconvenience " otherwise being caused by committal to quarter sessions. This ground gives wider scope to the magistrates' discretion than the others mentioned by your correspondent, and it is therefore more frequently available. I have in mind an instance where three men were committed by county magistrates on charges of gross indecency with each other, and one of them on a charge of bestiality; the latter charge being triable only at assizes. It would obviously be a serious inconvenience if charges arising out of one set of closely related circumstances were dealt with by different courts, so all were committed to assizes. The position was further complicated by one of the accused having been committed to quarter sessions for a borough within the same county, before his committal on the gross indecency charges, on charges of indecent assault and larceny. These related to quite simple matters of shoplifting and assaults committed in the same store. The recorder, acting under the powers conferred on him, remitted these cases to assizes; but it is submitted that the borough magistrates, had these cases come before them after the county magistrates' committal, would have been justified in exercising their discretion under section 11 by committing to assizes. If, however, section 11 did not include the ground of serious inconvenience, three courts would have had to deal with overlapping charges: assizes, county quarter sessions, and borough quarter sessions. There was nothing to justify the magistrates in finding, in respect of the charges triable at quarter sessions, that there were circumstances making the cases unusually grave or difficult, or that serious delay would be caused by committal to quarter sessions.

Yours faithfully,

G. S. Chambers,
Assistant Clerk to Justices.

*Colchester.*

## The Power to Prosecute

Sir,

In [1955] Crim.L.R. 602 I wrote that in the year 1908 prosecuting functions were taken from the Treasury Solicitor and concentrated in the hands of the Director of Public Prosecutions. I am indebted to a member of the Treasury Solicitor's Department for pointing out that I should have added a reference to the Prosecutions Branch formed in 1941 in the Treasury Solicitor's Department. This undertakes practically all the prosecutions for government departments that have not their own prosecuting officers. The Director of Public Prosecutions continues to deal with "real" crime.

Yours faithfully,
GLANVILLE WILLIAMS.

*Jesus College, Cambridge.*

# Books and Periodicals

*Group Problems in Crime and Punishment.* And Other Studies in Criminology and Criminal Law. By Hermann Mannheim. London: Routledge and Kegan Paul, Ltd. 1955. x and 299 and (indices) 9 pp. (28s. net.)

This book, divided into five Parts, is a modified collection of selected papers, articles and lectures written or delivered throughout the last twenty years. It will be of interest, in particular, to the criminal lawyer, social worker and sociologist, for "a process of drawing nearer is slowly taking place between the legal and the sociological-penological ways of approach to problems of crime" (p. vii). Anyone who has been associated with Dr. Mannheim will be aware that the truth of this statement is largely due to his hard work.

The contrasting of the function of the sociologist and the social worker in Part I of the book, dealing with Group Problems in Crime and Punishment, will be of interest to many workers in this wide field which, in England at least, tends to have such insubstantial boundaries. The Sociological Study of the Adult Offender takes up this point. The practical application in the criminal courts of the knowledge acquired by this method of study foreshadows Dr. Mannheim's work on prediction tables. The demarcation of fields of study and the nomenclature employed may not appeal to common lawyers, but no one interested in the criminal or asocial person can afford to neglect the sociological aspect. This is made apparent in "Comments on an Article" by Dr. N. Muller, where pilfering from employers and, in particular, from public authorities as part of a wider problem, that of habitual crime committed by "otherwise honest" people, is discussed. Similarly, Q. Camps and their variants present another illustration of remedial work through group treatment; these, as the author points out, are dominated by the persons in control, howbeit in the background. The modern approved school follows slowly in the train of these experiments, but it is inevitably hampered by the administrative problems which to some extent do not affect the smaller experimental units.

Part II, "Criminology and Its Methods," opens with an article on Lombroso, who "saved criminal science from the shackles of merely academic abstraction" (p. 70) and focused the attention upon the individual criminal. One result of this latter development is the astonishing description of types and mixed types classified by the so-called Crimino-biological School which succeeded Lombroso on the

Continent (p. 77). This classification certainly puts the "jargon" of the psychiatrist, which the common lawyer distrusts so profoundly, in the shade. "Three Contributions to the History of Crime in the Second World War and After" emphasise the effect of the breaking-up on a large scale of the family unit and consider different aspects of life during the war, such as shelter life, the black-out, looting, ill-treatment and neglect of children and crimes of an economic character. Although this chapter appears in Part II it is very much concerned with group problems. This subject is of practical importance since "mass violations of the criminal law may reveal hidden danger spots which no community can afford to neglect in a period of external crisis" (p. 100). The Methodological Problems of Criminology are inevitably highly specialised for, clearly, "methodological studies should be undertaken only by workers who are in close touch with actual research" (p. 116). If Dr. Mannheim proves correct in his assessment of techniques, and in particular with reference to statistical techniques and control groups, research along criminological lines would seem likely to become stereotyped. As regards the often criticised control groups, which he says "are an indispensable tool in any kind of research" (p. 120), he certainly refers to high authorities who have used this method; but surely it may be possible that this technique will work itself out and the fashion change. Dr. Mannheim is well aware of the weakness of the techniques employed, for example his discussion in this connection of control groups (p. 121). The passage on experimental research (p. 127) is most stimulating, though his reference to what the scientists would call an experiment, namely "an experiment in the scientific sense requires rigid control and the holding constant of all variables except those forming the subject of the experiment," would certainly raise problems in handling human material. Those who do not derive much understanding or knowledge from the Gluecks' studies, in particular "Unravelling Juvenile Delinquency," will be wanting a yard-stick in much that Dr. Mannheim says throughout the book ("A Critical Notice of an Experiment in the Prevention of Delinquency" (p. 146) provides one of many illustrations of this point).

Part III contains an interesting discussion on American prisons and criminology. The latter (p. 190) reviews the research carried out during the last thirty years and the changes which have occurred in the post-war period in its character and direction. This chapter is principally of interest to the criminologist and sociologist and shows the author's very high ability in assessing and indicating to others the requisite source reading. In this Part the lecture, not previously published, on American Juvenile Courts, is most helpful; it is regretted that it was not longer.

Parts IV and V deal with Penological Problems and the Criminal Law. The consideration of Short-Term Imprisonment, quite apart from the interesting subject under discussion, gives a helpful impression of the author's evaluation of the available alternatives.

The final chapter on the Treatment of Mental Disorders in Continental Criminal Law will be of value to those interested in comparative law and, in particular, in alternatives to the McNaghten rules. The chapter which precedes this, on The Sociological Aspects of the Law, recalls with pleasure the reading of the author's work *Criminal Justice and Social Reconstruction*, though here Dr. Mannheim is concerned with the contributions of writers on this subject which the practical lawyer, in pursuit of his more mundane, exacting work, too often neglects.

The author sums up his method on p. 117: "Flashes of insight, imagination and genius will, of course, always remain indispensable, but they alone are not enough and as experience has shown they may have their dangers unless constantly checked by seemingly very drab and pedestrian investigations carried out in accordance with a strictly disciplined methodology and with meticulous attention to detail."

T. E. JAMES.

*Diary of a Self-Made Convict.* By Alfred Hassler. London: Victor Gollancz, Ltd. 1955. viii and 182 pp. (10s. 6d. net.)

The author, a United States citizen, was sentenced to three years' imprisonment as a conscientious objector in 1944, and spent nine months in prison, mainly in the Federal Penitentiary at Lewisburg, Pennsylvania. As a record of prison life, it is an interesting and well-written book which will find a wide public. But it is much more than a mere diary of the months the author spent in jail; it is a serious and reasoned treatise on the prison system. Mr. Hassler's conclusions are summarised in the following passage from the final pages of the book: "The best of prisons does not reform or rehabilitate. It punishes, but punishment neither eradicates the original misdeed nor reforms the criminal. Neither does it serve as an effective deterrent, as is evident by the steadily rising rate of crime. It does not deter others from following a criminal career—for the simple reason that no man commits a crime expecting to be caught." If one does not always agree with the author, at least he has provided a great deal of material for reflection. However, the book is very readable, and this reviewer, at any rate, was left with the impression that the author is a very human and likeable person.

HENRY PALMER.

*Notes sur L'Affaire Dominici* suivies d'un essai sur le caractère des personnages. By Jean Giono de l'académie Goncourt. Gallimard: Paris. 1955. 152 pp. (350 frs.)

M. Giono, a writer well known in and well acquainted with the region of the Durance, has in this small book presented us with, first, notes taken during the trial of Gaston Dominici, and secondly an impression of the character of the principal witnesses. The latter takes the form of an essay on the characteristics of the region and its people together with a description of the Dominici family: it is the more entertaining part of the book.

The author has, in the style of a journalist, posed questions that remain unanswered. Why did the grandson Perrin lie throughout the proceedings ?—of him one of the magistrates has said, ". . . he lies as he breathes." Both Gaston Dominici's sons accused him of the murders, but Gustave withdrew his accusation. Clovis persisted in his accusation: he was Perrin's father. Did Dominici ever really understand the questions put to him ? He had a vocabulary of some thirty to thirty-five words. M. Giono pointedly observes that when he asked whether the admissions had been accurately reproduced he was told they had been, except that they had been put into French.

Yvette, the wife of Gustave, sat in the court and read. Her book? *When Love Conquers.* In the porter's lodge of the very court where he was being tried Gaston Dominici was born, the natural child of a servant-girl. The jury were honest men; they took no notes; they asked no questions. For one moment it seemed that they would ask one, for the foreman stood up and said, " M. le President . . . we would like this case to finish today."

As a series of impressions of the trial of Gaston Dominici this book is most entertaining: it does not pretend to be a critique of French criminal procedure.

D. A. GODWIN SARRE.

*Hue and Cry.* By Patrick Pringle. London: Museum Press, Ltd. 1955. 210 and (bibliography) 4 and (index) 16 pp. (15s. net.)

The subtitle of this book is " The Birth of the British Police " and in it the author writes of the work of the men who created the Metropolitan Police. A description of the life of Jonathan Wild shows the background before which worked Thomas de Veil, the Fielding brothers and Saunders Welch. The author says that the aim of his book is to entertain, but he certainly does more than that. He presents a clear account of the difficulties put in the way of these pioneers and how the principles upon which they worked have survived. The reader is well served by an excellent index and bibliography.

P. A.

*Background to Murder.* By Nigel Morland. London: Werner Laurie. 1955. 222 and (bibliography) 2 pp. (15s. net.)

Some murder cases seem to exert such a fascination on writers that they have to be frequently described, analysed and explained; and into this perennial category come the cases dealt with in *Background to Murder.* There are seven cases: William Wallace; the Croydon murders; Edwin Bartlett; Ruth Snyder; Florence Maybrick; Kate Webster; and Alma Rattenbury. The author has an inquiring mind, a deep understanding of human nature and a fine command of the English language, a combination which makes the book interesting and readable. Most of the cases are either unsolved or those in which there was some degree of doubt as to the conviction. Mr. Morland has undoubtedly taken a great deal of trouble in his researches, and is, therefore, able to put forward a number of new facts about each case. That, combined with his able presentation, has produced a controversial volume of murder cases.

HENRY PALMER.

**Books Received:**

*Against the Law.* By Peter Wildeblood. London: Weidenfeld & Nicolson. 1955. 189 pp. (16s. net.)

*Police Procedure and Administration.* Sixth edition. By Cecil C. H. Moriarty, C.B.E., LL.D., assisted by Lt.-Col. W. J. Williams, O.B.E., B.SC., LL.B. London: Butterworth & Co. (Publishers), Ltd. 1955. xvi and 326 and (appendices, tables and index). 42 pp. (10s. 6d. net.)

*The Essentials of Forensic Medicine.* By C. J. Polson, M.D.(Birm.), F.R.C.P.(Lond.), Barrister-at-Law, Professor of Forensic Medicine, University of Leeds. London: English Universities Press, Ltd. 1955. x and 539 and (index) 21 pp. (30s. net.)

*Road Transport Law.* Tenth edition. By L. D. Kitchin, A.M.INST.T., revised by E. K. Wenlock. London: Iliffe & Sons, Ltd. 1955. 126 and (index) 9 pp. (10s. 6d. net.)

**Reader's Digest:**

*Actus Reus in Criminal Attempts*: The recent case of *Campbell and Bradley* v. *Ward* [1955] N.Z.L.R. 471 raises the question of what test should be applied to decide whether an act amounts to a criminal attempt. In this article P. B. A. Sim considers this case and the " equivocality " theory put forward by Salmond J. in *R.* v. *Barker* [1924] N.Z.L.R. 865: 18 M.L.R. 620.

*Evidence—Recent complaints*: In indecency cases a recent complaint relating to the charge is admissible in evidence though made in the absence of the accused. This article deals in some detail with the cases ranging from *R.* v. *Lillyman* [1896] 2 Q.B. 167 to *R.* v. *Cummings* (1948) 92 S.J. 284: 99 S.J. 806.

*A Statutory Restriction on the Right to Prosecute*: Who may prosecute under certain sections of the Public Health legislation, *e.g.*, for obstruction and other street offences? This article attempts to give an answer by considering the history of the various offences: 119 J.P.J. 746.

*Reporting Crime*: Mr. R. A. Noble, G.M., Chief Constable of Burnley, points to some of the difficulties which the freedom of the Press in this country creates for the police. He suggests ways in which the creation of amicable relations between the police and journalists can further the cause of justice: *Police Chronicle*, November 11, 1955, p. 5.

*Identification Parades*: Inspector G. Harwood has written a short article on the conduct of identification parades; he gives the essential points but gives less detail and authority than was given in the article at [1955] Crim.L.R. 525: *Police Review*, November 18, 1955, p. 812.

*Are we saying too much?* This short article contains a criticism of the antecedent histories put forward in magistrates' courts by the police and a plea for their shortening: *Police Review*, November 25, 1955, p. 829.

# THE CRIMINAL LAW REVIEW

*Editors*
JOHN BURKE and PETER ALLSOP, M.A.
*Barristers-at-Law*

## *Editorial*

### Bail

In this issue we publish reports of two cases concerning the grant of bail; in *Ex p. Thomas*, p. 119, excessive bail was reduced after an application for a writ of habeas corpus had been made and in *R.* v. *Gentry*, p. 120, the Court of Criminal Appeal again criticised the granting of bail to accused with long criminal records. These cases and earlier ones [1] are reasons for restating some of the principles which should govern the grant of bail.

The purpose of bail is to secure the appearance of an accused person at a certain day and place to answer and be justified by law (Dalt. c. 166, Part 2); it is not intended to be punitive (*R.* v. *Rose* (1898) 67 L.J.Q.B. 289) and "excessive baile ought not to be required" (Bill of Rights, 1688).

The proper test of whether bail should be granted or refused is whether it is probable that the accused person will appear to take his trial. In *R.* v. *Phillips* (1947) 32 Cr.App.R. 47, Atkinson J. delivering the judgment of the Court of Criminal Appeal set out the considerations to be borne in mind as follows: "In cases of felony, bail is discretionary, and the matters which ought to be taken into consideration include the nature of the accusation, the nature of the evidence in support of the accusation, and the severity of the punishment which conviction will entail. Some crimes are not at all likely to be repeated pending trial and in those cases there may be no objection to bail; but some are, and house-breaking particularly is a crime which will very probably be repeated if a prisoner is released on bail, especially in the case of a man who has a record for housebreaking. . . . It is an offence which can be committed with a considerable measure of safety to the person committing it."

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[1] *R.* v. *Pegg* [1955] Crim.L.R. 308; *R.* v. *Wharton* [1955] Crim.L.R. 565.

### Stealing from slot meters

The case of *Martin* v. *Marsh* [1955] Crim.L.R. 781 has prompted a correspondent, a police inspector, to write as follows: " Police officers have on many occasions experienced the distress of genuine complainants whose meters have been attacked when they have been informed by the Gas or Electricity Board that it is their responsibility and the Board will hold the loser liable for reimbursement of the stolen money. Failure to pay results in the supply being cut off at the main.

" *Martin* v. *Marsh* seems to reverse the position and it would appear that the police would be fully justified when dealing with thefts from meters in quoting the local representative of the Region as the complainant; indeed, they should do so. This would regularise the position and it would be evident that every unauthorised person taking money from a meter could quite properly be prosecuted for theft. The question of ' intent ' when the meter is opened by the tenant to be a matter for the courts."

Unfortunately the position is not quite as clear as the inspector's note suggests. There seem to be three possible situations: 1. The situation in *Martin* v. *Marsh* where the meter and money put into it were the property of the electricity company. In this case the company would suffer if the meter were broken open by an outside thief and the householder who took money from it would be guilty of larceny.

2. The meter and money put into it are the property of the electricity company but there is a clause in the agreement between the company and the householder under which responsibility for the meter is transferred to the householder. In this case the householder would not only be guilty of larceny if he took money from it but, because of the special clause, he might also be liable to reimburse the company if somebody else took money from the meter.

3. The meter is a " pass meter," *i.e.*, one put in for the householder's convenience as, for example, in a lodging house or hotel, in which case the householder must bear any loss by theft, but as the contents of the meter are his he could not be guilty of larceny from it.

The answer would seem to be that before prosecuting for theft from a gas or electricity slot meter great care should be taken in each case to find out whose property are the meter and its contents.

### Imprisoned but not guilty

Three men, Emery, Thompson and Powers, sentenced in January, 1954, to imprisonment for causing grievous bodily harm to a police constable were released from prison on January 14, after two prisoners had confessed to the crime and inquiries ordered by the Home Secretary had established their innocence. The men have been offered payments amounting altogether to £1,000, but it is understood that they may take civil action against the police.

On January 16 the Court of Criminal Appeal quashed a conviction for receiving. Further investigation by the police had proved the accused to be innocent.

### In charge of a car, law or fact

A motorist was found by a police officer slumped in his car seat; he was subsequently examined by a doctor who considered him to be under the influence of drink. Earlier in the evening the motorist had handed his coat, in the pocket of which were his car keys, to a friend. The motorist was committed for trial to the Old Bailey because the magistrate had decided that it was a matter for an authoritative decision. Summing up Lord Goddard C.J. said: "Curiously enough, for a long time there seems to have been abroad the idea that the question of whether or not a man is in charge of a car is a matter of law. It seems to me it is entirely a question of fact, and questions of fact have to be resolved by a jury."

### Obstructing a local government elector

Under section 283 (1) of the Local Government Act, 1933, the minutes of proceedings of a local authority shall be open to the inspection of a local government elector for the area on payment of a fee not exceeding one shilling and that elector may make a copy or extract therefrom. By section 283 (7) of the same Act it is an offence punishable by fine not exceeding £5 for any person having the custody of the document to obstruct the elector in the course of his inspection or to refuse to give copies or extracts.

Our attention has been called to a recent case heard before the magistrates at Bridport, Dorset. The magistrates dismissed a summons alleging that the Town Clerk of Lyme Regis on November 17, obstructed a local government elector from making a copy or extract from the minutes of a meeting in committee of the town council. The complainant was in fact a member of the town council. The reason for the decision was that the minutes were those of a committee, not the council, and that the minutes were not before the council, only the reports of the committee.

### The Chief as witness for the prosecution

Chief Constables are not immune from accident and the opportunity to be chief witness for the prosecution, but rarely do they have the opportunities recently given to the New York police commissioner. According to the *Daily Telegraph*, January 3, 1956, he was making a tour of the city's New Year accident prevention measures, when his car was rammed from behind at a red traffic light, and he was slightly hurt.

Six summonses were served on the spot. The driver of the ramming car received one for not having his registration papers with him; the driver of another car, which caused the accident by ramming the first car, one ticket for having faulty brakes and one for letting his car get out of control; and the drivers of two breakdown lorries, who came to help, received tickets for not having car documents and for having a faulty rear light.

### New prison

The Prison Commission have been given permission by the Home Secretary to build a regional training prison at Hindley Field, Hindley and Abram, near Wigan. The establishment is to consist of a walled security prison for 300 men. It will be used largely for first offenders with sentences of up to four years. The proposed site of about 100 acres includes, in addition to the land required for the prison buildings and walled compound, areas to be fenced and set aside for reclamation and farming by prisoners.

### Parliament

#### *Capital punishment*

Since June 1, 1955, 292 individuals and 15 organisations have written to the Home Secretary in favour of the abolition of capital punishment and nine letters have been forwarded to him by Members of Parliament. He has given careful consideration to a memorial sent to him by the Howard League for Penal Reform, but he is not prepared to introduce legislation to suspend the death penalty for an experimental period (H.C. Debates, Vol. 547, col. *84*; December 8, 1955).

The Home Secretary rejected a suggestion that he should in future be present at all executions as a representative of the Government (Vol. 547, col. 545 ; December 8, 1955).

### *Constructive malice*

The recommendation of the Royal Commission on Capital Punishment that the doctrine of constructive malice in English law should be abolished will be considered by the Government when some prospect of legislation on the subject can be seen. The Royal Commission said in its report: " the practical effect of the doctrine of constructive malice at the present day is very limited and we cannot think that its abolition would lead to any striking change in the practice of the courts " (Vol. 547, col. 530; December 8, 1955).

### *Metropolitan police*

The Home Secretary does not consider that recent " sweeping and grossly inaccurate " statements about police corruption in the press justify a public inquiry into the conduct of the Metropolitan police (Vol. 547, col. 547 ; December 8, 1955).

### *Consorting with convicted criminals*

The Home Secretary refuses to introduce legislation similar to that successfully tried in Victoria, Australia, under which individuals habitually consorting with convicted criminals are liable to arrest and punishment. It would apparently be for a man who is so consorting to prove that his consorting is innocent and it is unlikely that the idea would be very acceptable in this country (Vol. 547, col. 541 ; December 8, 1955).

## Judicial appointment

Mr. W. J. K. Diplock, Q.C., has been appointed a judge of the High Court in succession to Mr. Justice Gerrard, who has resigned owing to ill-health. Mr. J. G. Foster, Q.C., has been appointed Recorder of the City of Oxford.

*Subscribers and others are invited to submit for publication articles and letters on matters of interest within the scope of this Review. They should be sent to the* EDITOR, *Criminal Law Review*, 3 CHANCERY LANE, LONDON, W.C.2. *Every effort will be made to return drafts or unsuitable copy, but no guarantee can be given in this respect.*

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# The Fraudulent Intent in Larceny

By Wing-Commander J. T. Lowe, ll.b., *Barrister-at-Law*

It is rather remarkable, having regard to the antiquity of the crime of larceny and its long historical development, that the mental element required in the commission of it cannot even now be regarded as definitely settled.[1]

It was not, indeed, until the time of East that we have anything like an elaborate definition. In defining the crime he wrote:

> " Perhaps it may with as much propriety be defined at large to be, the wrongful or fraudulent taking and carrying away by any person of the mere personal goods of another, from any place, with a felonious intent to convert them to his (the taker's) own use, and make them his own property, without the consent of the owner. . . . And Mr. Justice Blackstone says that the taking must be felonious, that is done *animo furandi,* or, as the Civil Law expresses it, *lucri causa* " ((1803) 2 P.C. 553).

Although this definition was elaborate, it was far from satisfactory. It embraced three elements, namely:—

1. A fraudulent taking and carrying away.
2. The absence of the owner's consent.
3. A felonious intent by the person taking the goods to make them his own property.

### *Fraudulent taking*

It will be seen from the definition that East equates the word " fraudulent " with the word " felonious," and is somewhat guilty of pleonasm since he stipulates both a fraudulent taking and a felonious intent. The equation had been effected long before the time of East, and all that was necessary in an indictment was the word " felonice " to indicate the mental state of the thief. East, further, it will be observed, explained the word " felonious " as meaning " *lucri causa,*" which involved him in considerable difficulty, since it needed little imagination to realise that cases could conceivably occur where the thief had secured no economic gain at all. There was, for instance, the celebrated *Fish Case* (1583) 2 East P.C. 661, in the reign of Elizabeth I, where a person took by force fish from a traveller on the highway and left money in excess of their value. In that case judgment was respited. Speaking of that case East said:

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[1] This mental element has already been discussed in the *Criminal Law Review* but receives more detailed treatment in this article.

> " And the circumstances of the party's offering the full value or more at the time ought to be left to them (*i.e.*, the jury) to show that his intention was not fraudulent, and so not felonious: for it does not necessarily follow as a conclusion of law, that if the value of the thing taken be offered to be paid at the time, the intent is therefore not felonious; though it is, I apprehend, pregnant evidence in the negative " (2 P.C., c. 16, s. 98, p. 661).

The proposition that the word " fraudulent " was synonymous with " *lucri causa* " was exploded in the later case of *R.* v. *Cabbage* (1815) R. & R. 292. In that case the prisoner forced open a stable door, took out a horse and led it to an old coal pit, where he backed it down and killed it. His motive for destroying the horse was that it might not furnish evidence against H. who had been charged with stealing it. It was clear that the prisoner had no intention of obtaining any pecuniary benefit from the theft. Thomson C.B. reserved the point as to whether a taking with such an intent constituted larceny, and it was held by six judges to five that it was not essential that the taking should be *lucri causa*, but that a taking " fraudulenter," with intent permanently to deprive the owner of his property, was sufficient.

This appears to be the first case in which it was laid down that there must be an intent permanently to deprive the owner of his property, but no explanation is vouchsafed as to what was meant by " fraudulenter."

The definition of East was reviewed by the court in the case of *R.* v. *Holloway* (1848) 2 C. & K. 942. After propounding the definition Parke B. said:—

> " This is defective, in not stating what the meaning of ' felonious ' in this definition is. It may be explained to mean, that there is no colour of right or excuse for the act."

This explanation, of course, equates the word " fraudulently " with the absence of a claim of right. Quoting this case, the learned editor of Russell on *Crime,* 10th ed., at p. 1175, expressed the view that the word " fraudulently " adds nothing to the definition of larceny, and that it is a mere echo of the ancient word " fraudulosa " in Bracton's definition and is without any legal significance.

A strong argument can, of course, be established in support of this view. It is difficult to see how a person who deprives an owner permanently of a thing without the owner's consent, and with no colour of right for so doing, can be acting otherwise than fraudulently. Thus Stephen J. wrote:

> " Fraud is inconsistent with a claim of right made in good faith to do the act complained of. A man who takes possession of property which he really believes to be his own does not take it fraudulently, however unfounded his claim may be " (*History of the Criminal Law of England*, Vol. III, p. 124).

This passage was quoted with approval in the case of *R.* v. *Bernhard* (1938) 26 Cr.App.R. 137. In that case it was laid down that a person has a claim of right within the meaning of the Larceny Act, 1916, if he is *honestly* asserting what he believes to be a lawful claim, even though it may be unfounded in law or in fact.

Similarly, in the modern case of *R.* v. *Williams* [1953] 1 Q.B. 660 at 666, Lord Goddard C.J. said:

> " If a person honestly believes that he has a right to the property which he is taking, and the taking is in the vindication of, or in the exercise of a bona fide claim of right, that person is not acting feloniously."

Can it then be said that the converse, *i.e.*, the absence of a claim of right must *ipso facto* fix the taker with fraud? In the vast majority of cases the absence of such claim does in fact settle the issue as to whether the prisoner acted fraudulently. This issue is always one of fact for the jury, and in the absence of a bona fide claim of right they have little difficulty in finding that the taker acted fraudulently.

The proposition, that the absence of a claim of right is conclusive evidence of fraud, was, however, categorically rejected in *R.* v. *Williams.*[2] In that case, the Court of Criminal Appeal laid down that the word " fraudulently " was not tautological but was intended to add something to the words " without a claim of right made in good faith."

In that case, the appellant wife was sub-postmistress at a village in Monmouthshire, and her husband carried on a shop at the same premises. The accounts both of the sub-post office and of the shop were kept entirely by the wife. Being in financial difficulties with regard to the shop, the wife, with the husband's knowledge, helped herself to money, the property of the Postmaster-General, from the till and falsified the post office accounts.

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[2] For a thorough and illuminating discussion of this case, see [1955] Crim. L.R. 18–26.

The husband and wife were indicted on eight counts of larceny and convicted on seven counts. The jury added a rider to their verdict that, in respect of two counts, the appellants intended to repay the money and honestly believed that they could, and that, with regard to three of the counts, they intended to repay but had no honest belief that they would be able to do so.

The questions posed for the consideration of the Appeal Court were:—

1. Whether or not the finding of the jury in respect of the two counts that the appellants intended to repay and had reasonable ground for believing that they could repay afforded a defence.
2. Whether the fact that they intended to repay, but had no reasonable grounds for their belief in respect of the other counts, afforded a defence.

In giving judgment and rejecting the appeal, Lord Goddard C.J. said ([1953] 1 Q.B. at 666):

> "The court thinks that the word 'fraudulently' does add and is intended to add something to the words 'without a claim of right,' and that it means (though I am not saying that the words I am about to use will fit every case, but they certainly will fit this particular case) that the taking must be intentional and deliberate, that is to say, without mistake. The person who takes the property must know when he takes it that it is the property of another person, and he must take it deliberately, not by mistake, and with an intention to deprive the person from whom it is taken of the property in it. A very simple illustration would be that of a person who picked up a suitcase at a railway station believing that it was his. There, the taking is under a mistake and he is not taking it fraudulently. Of course, if he knows it is not his own, as is the case with those people who haunt the railway stations for the purpose of stealing suitcases, then it is larceny; but if a person, although he is not setting up a claim of right against someone else, takes away a suitcase in the mistaken belief that it is his own, he is not acting fraudulently. We think that the word 'fraudulently' in section 1 must mean that the taking is done intentionally, under no mistake and with knowledge that the thing taken is the property of another person."

The word "fraudulently" is thus equated with absence of mistake. If this explanation does not render the word tautological, it gets extremely near it. In the first place, absence of mistake appears to be covered by the words "without a claim of right made in good faith." In the illustration put, it may, indeed, be said with some truth, that a person who took away a suitcase from a railway station, mistakenly thinking it to be his own, would be clearly acting under "a claim of right made in good faith," although such claim was clearly unfounded in law. (See [1955] Crim.L.R. 24.) Secondly, on the general principle of mistake in criminal law, a person who took another's suitcase for his own would not be guilty of larceny, and to suggest that the word "fraudulently" *simply* means that the person must not act mistakenly surely renders the word otiose.

What then should be the meaning assigned to the word "fraudulently"? [3] It is suggested that, in an attempt to ascertain its precise significance in the law of larceny, two principles have to be borne in mind. In the first place, the crime of stealing is essentially a wilful invasion of the proprietary rights of another. Secondly, such invasion is not to be measured in terms of economic gain or loss. Every person in lawful possession of a thing has the right to expect non-interference with that thing whether it be of a great value or a small value, provided it is of some value. There is a great danger, when posing the question of whether a person charged with larceny has acted fraudulently, even at the present day, of equating fraud with *lucrum*. A jury find it difficult to accept the proposition that a person who has secured no economic gain has acted dishonestly. This is notoriously so in cases where a person has deliberately used another's money and then replaces it. His replacement, they argue, affords evidence that he was not dishonest although the plain fact is overlooked that, in taking the money, he has deliberately invaded the prosecutor's proprietary rights.

### *The owner's consent*

The mental element required in larceny is an intent to usurp an entire dominion over a particular thing. It will further be conceded that before a person can be convicted of larceny it is necessary to fix this intent with fraud.

Fraud, of course, is a mental element, an operation of the mind. As was said in *Angus* v. *Clifford* [1891] 2 Ch. 449 at 471:

> "So far from saying that you cannot look into a man's mind, you must look into it, if you are going to find fraud against him; and unless you think you see what must have been in his mind, you cannot find him guilty of fraud."

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[3] See [1955] Crim.L.R. 23–26, where the meaning of "fraudulently" is also discussed.

This mental operation, however, does not stand by itself; it involves the knowledge that another person is in fact being defrauded. This sounds very elementary but it appears to need emphasising. In *R.* v. *Williams,* for example, this second element was not mentioned at all. It is not enough to know that you are taking the property of another person with an intention to deprive him of it; you must also know what that other person's attitude of mind is with respect to your conduct.

The phrase, "felonious taking," in itself is rather inapt. There can, of course, be no such thing as fraud in relation to a physical act. You cannot, for example, fraudulently raise your hand which is a mere muscular movement. Fraud involves that in your own mind you have the knowledge of another person's mental processes. The word "felonious" historically denoted the breach of a personal relationship. It denoted a breach of trust or disloyalty between a man and his feudal overlord. (See Russell on *Crime,* 10th ed., at p. 1163.)

When this twofold aspect of fraud is borne in mind, it is clear in the law of larceny that in alleging that the accused acted fraudulently, it is *ipso facto* postulated that his mental state embraced knowledge of the state of the owner's mind. The only mental process of the owner concerned in the law of larceny is the question of his consent or non-consent. It, therefore, reduces itself to this, that before the accused can be convicted it must be shown in fact that he *knew* the owner did not consent. Let us consider the possible cases, which may arise:—

(1) The accused thinks that the thing does not have an owner at all, and that, therefore, no question of consent arises.

(2) The accused thinks that he has a right to acquire possession of the thing and to keep it permanently. Here, again, the question of consent does not arise because the accused honestly believes it is immaterial.

(3) The accused receives possession of the thing with the owner's consent to possession only and subsequently decides to keep it permanently.

(4) The accused receives possession of the thing from the owner with the owner's consent to possession only and, nevertheless, simultaneously decides to keep it permanently.[4]

(5) The accused receives possession of the thing from the owner knowing at the time or later that the owner did not in

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[4] Strictly, of course, the consent of the owner to possession is negatived by the *animus furandi* but *quaere* in civil law. (See *Pearson* v. *Rose and Young Ltd.* [1951] 1 K.B. 275.)

reality consent to his possession at all. Nevertheless, he decides to keep it permanently.

(6) The accused takes the thing out of the owner's possession knowing that the owner did not consent to his possession and, simultaneously or later, decides to keep it permanently.

Apart from larceny by finding, and apart from what is said below, it is submitted that the above cases are exhaustive. The object of setting out the cases *in extenso* is to emphasise the accused's awareness of the owner's mental state. In cases (1) and (2), there is no larceny at all; in case (3) there is larceny by a bailee; in case (4) there is larceny by a trick; in case (5) there is larceny by mistake; and in case (6) there is simple larceny including the anomalous case which arises out of the doctrine in *R.* v. *Riley* (1853) Dears C.C. 149.

In the cases where larceny is committed, the essential point to notice is that the fraud hinges entirely upon the accused's knowledge of the owner's lack of real consent. Cases (4) and (5) are deserving of special notice. Case (4) was established as larceny by the celebrated case of *R.* v. *Pear* (1779) 1 Leach 212, a case which has been much criticised and battered about. The fierce controversy which was aroused over that case centred on the issue as to whether the prosecutor consented to possession of the horse. If he did, there was no trespass and so no larceny. Now one thing was beyond question in that case, and that was that the prosecutor consented to deliver the horse on a genuine and not a sham bailment. He consented to possession. Did that then dispose of the case? By no means, for the thief knew the extent of the prosecutor's offer. The prosecutor said, in effect, to him: "I deliver to you a *lawful* possession." The thief, however, had no intention of acquiring a lawful possession but an unlawful possession. The moment he acquired the horse he was in unlawful possession of it. His knowledge that the prosecutor was not consenting to unlawful possession fixed his mind with fraud.

Similarly in cases of larceny by mistake the thief knows that in reality the owner does not consent to possession. The judges in *Middleton's Case* (1873) 12 Cox 417, upholding the conviction, said:—

> "The finding of the jury that the prisoner at the moment of taking the money . . . was aware of the mistake puts an end to all objection from the fact that the clerk meant to part with the money."

It is this double aspect of fraud, it is suggested, which affords a clue to the meaning of the word "fraudulently" in section 1 (1) of the Larceny Act, 1916. Obviously the word "fraudulently" cannot stand by itself adverbially in the subsection. The natural interpretation, it would appear, is to take it as qualifying the main verbal clause "takes and carries away." In that case, the word should be transposed and placed immediately before the word "takes." This is in harmony with the whole common law doctrine of larceny, which from very early times insisted on a felonious taking and further insisted that an innocent possession followed by a subsequent appropriation was not larceny.

If this be the proper interpretation then the word "fraudulently" merely emphasises the nature of the trespassory act. The ouster of possession must be a deliberate ouster in wilful defiance of the prosecutor's possessory right. In other words it comes to this, that the accused acts fraudulently when he knows that the owner does not in reality consent to his appropriation of the thing.

If this, then, be the meaning to be placed upon the word it may be objected that it is indeed tautological since this meaning is already covered by the words "without the consent of the owner" and the words "without a claim of right made in good faith." In other words we are back to the *Holloway* case. Let it be conceded that in 99 cases out of a 100 the absence of a claim of right, in itself, does indeed settle the issue of fraud, yet may there not be the hundredth case in which this is not so? Consider, for example, the following case.

The accused takes the thing out of the owner's possession knowing that the owner does not consent to his possession and decides to keep it permanently, but intends to recoup the owner later for his loss. Further, he honestly believes that if the owner had been asked he would have consented to what he, the accused, did.

Now, assuming that the word "fraudulently" is omitted from the definition all the ingredients of larceny are present. It would, however, be a great economy of truth to say that in this case the accused has acted fraudulently. Although section 28 (1) of the Road Traffic Act, 1930, deals with trespass and not with larceny its provisions may be in point. That section reads:—

"Every person who takes and drives away any motor vehicle without having either the consent of the owner thereof or other lawful authority shall be liable (a) on summary conviction, etc."

The section then goes on to provide as follows:—

"Provided that if . . . the court, or . . . jury (as the case may be) are satisfied that the accused acted in the reasonable belief that . . . the owner would, in the circumstances of the case, have given his consent, if he had been asked therefor, the accused shall not be liable to be convicted of the offence."

There is every reason to suppose, therefore, that, if an accused upon a charge of larceny could satisfy the court along the lines laid down in this proviso, the court would hold that he had not acted fraudulently. The word "fraudulently" in section 1 (1) would in the case put save the accused from conviction. Further it would appear that in the case put and in this case alone it would, in fact, save him.

In putting forward the above suggestion, it will be observed that the word "fraudulently" has become disentangled from the area of mistake with which it became enmeshed in *R.* v. *Williams*. In the case put, the accused is under no mistake at all. He knows that the thing does not belong to him; he knows that the owner does not consent to its appropriation and he knows that he has no claim of right to the thing. He does, however, believe that he would have received the owner's consent if he had asked for it.

Of course, such cases as the one postulated above would be exceedingly rare, except in cases where money was the subject of unlawful appropriation.

We may now turn to the hypothetical case postulated by learned counsel for the appellants in *R.* v. *Williams*. The case put was:—

> "A barrister is unexpectedly compelled to spend the night in London, away from home. Working late in chambers, he remembers that he is short of cash, and takes some from the desk of a brother barrister, and at that moment a policeman appears."

All the ingredients of larceny are present apart from the meaning to be attached to the word "fraudulently." As the law stands, as laid down in *R.* v. *Williams* the barrister would have acted fraudulently, since:—

(1) He clearly took the money intentionally and not mistakenly, and;

(2) He took it without any claim of right.

On the test suggested above, before it could be determined whether the barrister had acted fraudulently it would be necessary to know what his state of mind was on the subject-matter of the owner's consent. If he could satisfy the court that he genuinely believed the brother barrister would have consented to his taking the money he would not have acted fraudulently. If, on the other hand, he had no such belief, then he would have acted fraudulently.

If the test suggested above is applied to the facts of *Williams'* case, the appellants were clearly guilty of larceny since they had no reason to suppose that the Postmaster-General would have given his consent to their using public moneys in running their private business.

It has been laid down more than once—it was repeated in *R.* v. *Williams*—that the *locus classicus* upon the meaning of "fraudulently" is the case of *R.* v. *Carpenter* (1911) 22 Cox 618. It is worthwhile, therefore, examining that case.

The facts were that A. by falsely representing that he was carrying on a genuine and solvent banking business, induced a number of persons to deposit money with him. He paid interest to those depositors out of fresh deposits. His expenses exceeded his receipts. The attention of the Public Prosecutor was called to his business and A. was notified that it must cease and that the depositors must be informed of its insolvency. At the trial he gave evidence that if he had been allowed to carry on business for a few more years he would have been able to realise his assets for a sum which would have paid all his creditors. It was held that the mere fact that A. intended to repay the money and may have honestly believed that he could repay the money did not prevent him from having an intent to defraud. Giving judgment, Channell J. said, at 624:—

> "If the defendant made statements of fact which he knew to be untrue, and made them for the purpose of inducing persons to deposit with him money which he knew they would not deposit but for their belief in the truth of his statements, and if he was intending to use the money so obtained for purposes different from those for which he knew the depositors understood from his statements that he intended to use it, then, gentlemen, we have the intent to defraud, although he may have intended to repay the money if he could, and although he may have honestly believed, and may even have had good reason to believe, that he would be able to repay it."

It is submitted that the above test suggested as to the meaning of "fraudulently" falls exactly within this passage. The test applied in *Carpenter's* case as to the meaning of "fraudulent" was whether the prisoner was using the depositors' money in the way they wanted it to be used. Applying this test to the case of *R.* v. *Williams,* Lord Goddard C.J. said ([1953] 1 Q.B. at 667):—

> "For 'statements' (*i.e.,* those made in *Carpenter's* case) . . . we have to substitute 'actions,' because the money was taken, it was not obtained by statements. Here the money was taken and the appellants intended to use the money for purposes different from those for which they were holding the money and for which the persons who paid the money intended

> it to be used, namely, for paying the Postmaster-General for stamps or postal-orders, and for purposes different from those which their employer the Postmaster-General, to their knowledge, intended they should use it."

It may be argued that the meaning of " fraudulently " suggested above takes no account whatever of the prisoner's honest intention and ability to recoup the prosecutor. Suppose in the hypothetical case of the barrister for instance, he had put the money back the next morning. Could it be seriously contended he was guilty of acting fraudulently? To answer that objection let us vary the facts a little. Supposing the brother barrister had been present in chambers and the prisoner had asked him to lend him the money until the next morning. Supposing the brother barrister had categorically refused, upon which the prisoner went to the desk and, without the brother barrister's consent, took the money. Would he or would he not be acting fraudulently? If the answer is " Yes," then the mere fact that he replaced the money the next day is surely irrelevant.

The defence is constantly put forward, in cases involving the larceny of money, that the prisoner intended and was able to repay. The decision in such cases often hinges upon the prisoner's ability to repay as distinct from a mere speculative hope of repaying it. The plain fact that the prisoner has wilfully flouted the prosecutor's proprietary rights is ignored. The issue very often placed before the jury is not whether the prisoner took the money wilfully, knowing that he had not the prosecutor's consent to take it, but whether he manifested an *animus poenitentiae* and put the money back. To base any decision upon the prisoner's intentions as to future repayment, is, it is submitted, to shift the centre of gravity of the crime.

The result is that a jury may very well be left upon an uncharted sea. Wherein, for instance, does the distinction lie between an ability to repay and a speculative hope of repayment? That a person has an ability to repay is no proof that he intended to repay. In a court-martial case in Baghdad on June 12, 1942, Captain Dampier Bennet placed the issue before the court thus:—

> " The question of repayment and an intention to repay has been much canvassed in this case. What would you say if you caught the burglar who had taken the silver from your house at your door as he was going away and he said: ' I was going to put it back tomorrow.' I am not suggesting that this is a parallel to this case at all. That is the sort of case that you find at one end of the scale. At the other end you might get somebody that takes from his friends' table a Dinar note

> and leaves a chit in place of the note saying that he had taken the note and was going to replace it the following day, because he was going to make urgent purchases. Whereabouts in the range does this particular case lie? It seems to me that you cannot generalise about repayment of money that has been wrongfully taken."

No criticism can be advanced on this passage. It is the best that can be done when the issue of the prosecutor's lack of consent as the criterion of fraud is ignored.

If the crime of larceny is viewed in its true perspective as a wilful invasion of the proprietary rights of another it should be tolerably clear that where a prisoner has taken the money of another, well knowing that he had no consent to do so nor any reasonable grounds for supposing that he would have received such consent, he has acted fraudulently and his intention of future recoupment is beside the point. To the criticism that this interpretation of the word " fraudulently " is unduly strict and apt in practice to penalise essentially honest persons, the following observations may be made. In the first place, he who uses the money of another for purposes which he knows the owner would not sanction is dishonest whether he intends recoupment or not. That is not to say that there are not degrees of such dishonesty. The act of dishonesty must vary with the degree of risk of loss to which the owner is put, and may range from a mere peccadillo of taking a one pound note temporarily for a few hours to cases of gross fraud. Secondly, the more trivial the dishonesty the more unlikely the prosecutor would be to press a case, and the very triviality might afford evidence that the accused believed that the prosecutor would have consented to what he did, or may induce the court to dismiss the case. Thirdly, it is better that the word " fraudulently " should be given a specific interpretation in the law of larceny than that it should be left without any explanation at all. The later cases, as, for instance, that of *R.* v. *Williams,* show that the courts are inclined to the view that the unlawful use of other people's money without the owner's consent is not lightly to be met with pleas of an intention to repay, which are often specious and without foundation.

# The Magistrates and the Murders in the Ratcliff Highway

By Stanley French
*Chief Clerk, Thames Magistrates' Court*

### *Murder as a Fine Art.*

The murders in the Ratcliff Highway had few of the features which make such crimes remembered from generation to generation. Victims and murderer were humble people of no particular interest, the method of killing was neither original nor ingenious but crudely brutal, the murderer made no attempt to conceal his crimes, he was not discovered as the result of clever detective work or elaborate scientific investigation, and there was no dramatic trial to give them a place in somebody's "Famous Cases." They were extraordinary only in their wholesale nature, in their savagery, and in the terror they inspired far beyond the East End of London, which was their scene. It is probable that they would have been forgotten long ago if they had not so captured the imagination of Thomas de Quincey that he described them in his famous essay "On Murder Considered as One of the Fine Arts" as "the sublimest and most entire of their excellence that ever were committed," and many years later wrote as a postscript to that essay a detailed account of the murders, which in its evocation of atmosphere, reproduction of tension and splendid clarity of language is the best description of its kind in English literature.

de Quincey got his facts from the newspapers and on the whole was faithful to them, but when it suited his artistic purpose he did not hesitate to alter or omit some of the details or to put his own interpretation upon them. Moreover, there were one or two matters of which neither he nor the reporters knew. It is possible, however, by reference to copies of several letters dealing with the murders, which have survived in the archives of Thames Magistrates' Court, and to contemporary newspaper reports, to follow to some extent the story, untouched by the imaginative genius of de Quincey, as it unfolded itself to the magistrates of the East End.

### *The Thames Police Office*

The magistrates immediately concerned were the three sitting at the Police Office in High Street, Shadwell, established in 1792, in whose district the murders were committed, and the three at the Thames Police Office at 259 Wapping New Stairs. The latter office had been opened in 1798 to deal specifically with the wholesale thieving and petty pilfering from ships in the Thames and from warehouses on its banks which levied heavy tribute on commerce in the Port of London in the eighteenth century, but it had acquired a greater influence in the East End than either the Shadwell office or the other "land" office at Lambeth Street, Whitechapel.

There were two reasons for this. One was that whereas the "land" offices had only half a dozen constables attached to them, mainly for the execution of process, the Thames magistrates were in charge of a disciplined body of some eighty constables which had been formed to patrol the river in boats day and night and which had proved so successful that, as the only force of its kind, it was often called upon by the Government in troublous times to do duty elsewhere in the Metropolis.

de Quincey was wrong, therefore, when he wrote that at the time of the Ratcliff Murders "no adequate police existed except the detective police of Bow Street, admirable for its purpose, but utterly incommensurate to the general service of the capital." There was a police force in existence which had had thirteen years of experience of the criminals of the East End, and it would have been strange if it had remained idle whilst the district in which it was normally so active was trembling with fear of an unknown and apparently maniacal killer.

The second reason for the pre-eminence of the Thames Police Office was that the senior and resident magistrate there was an exceptionally energetic and forceful man named John Harriott. One of the two progenitors of the Thames Police, he had been sailor, soldier, farmer, emigrant to America, and justice of the peace in Essex before he became the first magistrate at Thames, and quickly established himself as the strong man of the East End. It was not in his nature to stand aside when there was work he could do, and as soon as he heard of the murders he threw himself heart and soul into the discovery of their perpetrator.

### *The first victims*

The first murders were committed on December 8, 1811 (not 1812 as de Quincey says). On that day Harriott wrote to the Under Secretary of State for the Home Department, for the information of Mr. Ryder, the Secretary of State, an account of their "leading circumstances," in which their horror is apparent despite the baldness of the narrative. It said "A Mr. and Mrs. Marr, Haberdashers in Ratcliff Highway, with their child and a servant lad, were all found to have been barbarously murdered between 12 and 2 o'clock this morning. The servant girl says that at about twelve last night she was sent by the Mistress to get some oysters. She left her Master busy in the shop and on her return found the door shut. She rang and called until the watchman came, to whom she made known the circumstance of her being shut out. He remembered that soon after 12, as he went his rounds he noticed the bolts of the shutters were not fastened, on which he called to Mr. Marr, when he was answered from within that he knew it, on which the watchman passed. He was returning when he saw the girl at the door, and observing the bolts still unfastened, he rang and called until the people at the next house came out.

"Finding none to answer they went round to the back door which was open and a lighted candle on the floor. The first shocking spectacle was a servant lad with his brains beat out. The master was found behind the counter with his brains in like manner, the mistress was also dead from a blow on the head, close to the street door, and their child 4 months old with its throat cut in the cradle."

When he wrote that, Harriott had already been very busy. He had hurried to Shadwell to assist his colleague on duty there, Mr. Markland, to question the maid, and then he had gone to "the house where the bodies lay, the better to form an opinion of the transaction, as to the way in which it had been accomplished." One of his officers had searched the house and found a hammer or maul weighing ten or twelve pounds lying in a room on the first floor; it was smeared with blood. On the shop counter was a long iron chisel.

Harriott thought that the circumstances of the murders all pointed to at least two people being involved, who had planned their operations for a Saturday night "when the shops are kept open so late. When watching the master pulling up the shutters and leaving the doors open, when he went in to fasten the bolts they rushed in and perpetrated their horrid murders, but being disturbed by the girl returning and ringing for admittance they made their escape by the back door without any booty, as the shop goods, the money and bank notes were not meddled with."

He told the Under Secretary of State that "The prospect of detection at present is confined to two points, the one whether any female (there being 10 or 12 young women employed to work in the house) having a knowledge of Mr. Marr keeping monied property by him, has been concerned in plotting, and who by a reward and offer of pardon may be induced to come forward and discover the perpetrators, the other point is that the maul has a singular mark by which it can be identified." He did not tell the Under Secretary what that singular mark was, although all he needed to write was "the maul has the letters 'J.P.' on it."

Whilst this omission to tell the Under Secretary about the initials did not matter, it mattered very much that nothing appears to have been done to let the general public know what they were. It is true that the Thames constables were directed "to inquire most minutely at the places where such mauls are sold, and at all old iron shops where such an article may lately have been purchased," but such inquiries were bound to be abortive if, as was quite likely, the maul belonged to someone who had bought it outside the East End or a long while ago. The most likely source of information would have been people who had seen the maul in use, such as fellow workmen of the owner.

A reward of £50 for information leading to the arrest of the murderers was offered by the parish of St. George, and Harriott himself advertised that a reward of £20 would be paid for information leading to the arrest of three suspicious characters who were reported to have been lurking near the Marrs's shop and peering into it at about the time of the murders. Three such men had been arrested only a few hours after the discovery of the murders. They were foreign seamen who were found near the shop, and one of them had spots of blood on his trousers. They were charged "on suspicion" and taken before John Harriott, who soon discharged them because he was satisfied that they could have had nothing to do with the crime as they had come up from Gravesend between 4 and 5 that morning.

The advertisements brought Harriott no useful information and got him into trouble with the Home Office, because he had no authority to offer a reward. As a man of action he must have found the existence of limitations on his power to do anything that seemed necessary in an emergency most frustrating, but he wrote a somewhat abject letter of apology to the Under Secretary for "suffering my zeal for discovering these atrocious murderers to run me into an error that has incurred Mr. Ryder's and your displeasure . . . not knowing that the discretionary powers of police magistrates on such extraordinary occasions were so limited." He sent a copy of the advertisement to show that "the reward offered was applicable to the discovery of the three suspicious characters only and in the hope that some other person might also have seen who might know something of them which might lead to a detection, though the same person who should have seen and known any of them might not consider that a sufficient circumstance to give evidence upon," and like a schoolboy who points to a friend and says: "Please, sir, he did it too," when accused by his master of misbehaviour, Harriott brought his colleagues Mr. Longley and Mr. Kinnaird into it by emphasising that what he had done was with their approval. He promised, however, that "for the future I will take especial care to keep my zeal within bounds."

Although there was nothing to indicate that the murderers were either sailors or foreigners, Harriott's men searched every vessel in the Thames, paying particular attention to the foreign ones, and even went as far as Gravesend, where the commanding officers of both the men-of-war and the East Indian merchant ships mustered their crews for examination. On land, as de Quincey says, "On every great road in the kingdom arrests were made of vagrants and 'trampers' who could give no satisfactory account of themselves," and some of those so arbitrarily arrested came before the magistrates at Shadwell or Wapping.

After twelve days of this activity the identity of the murderers was still as far from discovery as when it began, when the general alarm that they were still at large was intensified beyond words by three more murders as savage and horrifying as those of the Marrs.

### *The second victims*

The victims this time were three of the five members of the household of Mr. Williamson, landlord of the King's Arms public-house in New Gravel Lane, Ratcliff Highway, only two streets away from the Marrs's shop and backing on to the same piece of waste ground.

Unfortunately there is no letter describing these murders in the Thames archives. *The Times* account (December 21, 1811), from which de Quincey probably got most of his facts, said:

"On Thursday night, between the hours of eleven and twelve, another scene of sanguinary atrocity was acted in New Gravel Lane, Ratcliff Highway, equalling in barbarity the murders of Mr. Marr and family. The following particulars are the substance of what has yet transpired with respect to this fresh instance of ferocity.

"Mr. Williamson and his wife kept the King's Arms public house in New Gravel Lane, and the other inhabitants of this house consisted of an old woman, who collected pots and waited in the taproom; a little girl, about 14 years of age, their granddaughter [de Quincey says she was 9] and a man named John Turner, their lodger. On Thursday night, a little before eleven, Turner came home to his lodgings, and after wishing his landlord and landlady a good night went upstairs to bed. Mr. Williamson was then preparing to shut up his house. Turner almost immediately after he got into bed fell into a sound sleep, in which he continued for about half an hour, when he was awakened by a noise below stairs. He listened a few minutes and heard the serving maid crying out "We are all murdered!" Not knowing what was the matter he stole downstairs undressed and cautiously looked through the taproom door, which had a glass window in it. The first object that he saw was a man dressed in a drab, shabby, bearskin coat, stooping over the body of Mrs. Williamson, which was lying at the fireside. He could not see what the man was doing, but he heard the jingling of money and supposed he was rifling her pockets. His ears were then assailed by the deep sighs of a person in the agonies of death. Terrified beyond description he ran upstairs to the top of the house, with a view to making his escape. In his fright he could not find the trapdoor in the roof; he therefore returned to his own room, threw up the window, and, tying the sheets of his bed together, and fastening them to the bedposts, he descended safely to the ground with the assistance of the watchman who, happening to pass at that instant by the house, received him in his arms.

"The neighbourhood was immediately alarmed. It was yet an early hour, not twelve, and several persons soon assembled round the house. The door was knocked at, but no answer being made, the door was broken open with an iron crow.

"Upon entering the taproom, the bodies of Mrs. Williamson and the maid, Bridget Harrington, were found besmeared with blood, with their heads towards the fireplace. The head of the latter was almost severed from her body and the skull itself fractured in the most frightful manner, the brains protruding. Mrs. Williamson had also her throat cut, and her head very much shattered.

"Those who entered then went downstairs, and upon entering the cellar they found the body of Mr. Williamson lying lifeless, with a long iron bar under his body. His throat was dreadfully cut on the right side. The wound appeared to have been made to the front of the neck by some stabbing instrument, and afterwards enlarged while the instrument remaining in the first incision.

His hand appeared to be dreadfully hacked and cut, one of his thumbs being completely severed from the left hand. His right leg received a compound fracture, the bones of it being seen through the stocking. From his general appearance it was evident that he had made a vigorous resistance to the murderers. The iron bar found under his body was stained with blood and it appeared to have been wrenched from a window in the cellar." The granddaughter was found unharmed upstairs, having slept through the terrible affair.

### "*Discovery of the perpetrator*"

As soon as he heard of the second massacre the Resident Magistrate at Thames went with some of his men to Shadwell Police Office " to assist," as he told the Home Secretary, " towards the discovery of the perpetrators," and later the magistrates from the Thames, Shadwell and Whitechapel offices held a meeting for the purpose, as Harriott somewhat tautologically put it, " of considering the most effectual measures to be adopted of co-operating in exerting their joint endeavours."

An important result of their deliberations was that bills were at once printed and widely distributed, describing the maul used in the Marr murders " in the most particular manner," and calling upon anyone with knowledge of it " to make the same known." The failure to do this before fully deserved de Quincey's censure. He said that " the publication of the circumstances of the initials led immediately to the apprehension of Williams and if made earlier would have prevented his second great work (the murder of the Williamsons) which took place precisely twelve days after. Yet the magistrates kept back this fact for the entire twelve days and until that second work was accomplished. That finished, they published it, apparently feeling that Williams had done enough for his fame and that his glory was at length secure beyond the reach of accident."

The magistrates also ordered inquiries to be made for a watch belonging to Williamson which could not be found and might have been taken by the murderer.

John Tanner, the Williamson's granddaughter, George Fox (the brave man who first entered the stricken house), and a workman named Stroud who had warned Williamson that a strange man was hanging about the public-house door were all called before the magistrates to tell their story. Also brought before them was a man named Sylvester Driscoll who had been found in the street soon after the discovery of the murders with four bottles of spirits concealed under his coat. The constable who arrested him thought that the bottles might have been stolen from the King's Arms, but Driscoll strenuously denied this. Rather than be accused of murder he preferred to confess that in pursuance of a desire to lay in "a little drop, as usual, for Christmas" he had purloined the spirits from a warehouse at London Docks.

Another man was arrested in Marlborough because he answered the description given by Turner of the man he saw bending over the body of Mrs. Williamson. He told the Shadwell magistrates that he had worked for a Mr. Williamson near Ratcliff Highway, and a number of witnesses gave evidence that they had seen him in or near the King's Arms on December 20. He then took fright and confessed that he had pretended to have worked for Williamson to conceal the fact that he was wanted by the Army as a deserter.

On December 23 the Shadwell magistrates had several persons before them to whom some suspicion of complicity in the murders attached, although against only one of them was there a scintilla of evidence, and that not enough by modern standards to justify his being charged. This man was a seafarer named John Williams. *The Times* (December 24, 1811) said that he "underwent a very long and rigid interrogation."

The allegations against him were that he had frequently been seen at the King's Arms and had been there at about 7 o'clock on the night of the crime, that he did not get home till midnight when he asked a fellow-lodger to put out the light as though he did not want to be seen, that he corresponded to the description of the man who had been seen hanging about the King's Arms in that he was tall, lame and Irish, and that he was short of money before the crime but had a good deal of silver on him when arrested. After hearing this the magistrates called upon him to give an account of himself. He said that he was almost an intimate friend of the Williamsons, described his movements on the evening in question to show that he could not have been near the public-house when the murders were committeed, although he admitted being there about 7 p.m. as had been said, and explained his possession of money by the sale of some clothes.

It may be that the magistrates knew of more damning evidence to come, for on this flimsy case they remanded Williams until the next day, Christmas Eve, when his landlady, Mrs. Vermilion, gave evidence. She told the magistrates about the disappearance within the previous three weeks from a chest of drawers left in her custody by a young German sailor called John Peterson, and kept in the same room as Williams's belongings, of two or three mauls which were probably marked, like most of the other tools in the chest, with the letters J. P.

She was then examined in a way which does not accord with present-day practice in examination-in-chief. "The bloodstained instrument with which the unfortunate Mr. Marr and family were butchered was then produced, at the sight of which the witness shrunk back with horror and consternation. It was with great difficulty she could be got to look at it steadily. She was desired to say whether she had not seen it in her husband's possession and whether it was not the same with which her husband sometimes broke up wood. She answered that she might have seen it but she would not be positive." These leading questions were put to her in different ways again and again but her answer was always the same—she would not commit herself.

After Mrs. Vermilion, her sister-in-law was called to say that she had washed two torn and bloodstained shirts for the prisoner, one before the murder of the Marrs and one four or five days after. The prisoner " begged to account " for the state of the first shirt and described a fracas in the Royal Oak in which his lip had been cut so that it bled badly and stained his shirt. The magistrates told him that the first shirt did not matter ; it was the second shirt they wished to hear about, but on that Williams appears to have remained silent. He was again remanded.

When he appeared before the court on the day after Christmas Day a man named John Frederick Richter was questioned about his knowledge of him. Hardly anything this man said would be admissible in evidence today. He said he did not think that Williams looked like a seafarer but he had heard that he had been employed on the *Roxburg Castle,* and that the captain of that vessel had observed that if ever Williams went on shore he was sure to be hanged.

After this entirely valueless testimony Williams was remanded to the next day. So far the proceedings had not produced anything like a prima facie case against him and bore much more similarity to preliminary investigation by a modern French magistrate as it appeared to the English reader of reports of the Drummond case than to an inquiry by examining magistrates under section 7 of the Magistrates' Courts Act, 1952, or the Indictable Offences Act, 1848. The fact was that until the Metropolitan Police Acts of 1829 and 1839 the magistrates were not only judicial officers but, to some extent, senior police officials as well, and the inquiries they conducted into the Ratcliff murders would today have been entirely in the hands of detectives and the interviews and interrogations pursued in the privacy of a police station instead of in open court.

It is obvious that no one was at all sure that Christmas that the murderer who had put the East End in the grip of terror was not still at large, for throughout the holiday women and children sat trembling behind locked doors whilst the men of Wapping and Shadwell patrolled the streets in strong groups, assisted by ten officers of the Thames Police whom Harriott had directed to forsake their boats for the land until further notice.

On December 27, when the magistrates assembled at Shadwell Police Office soon after ten to continue their examination of Williams they were told that he had committed suicide. Their gaoler, Robinson, had gone to the New Prison in Coldbath Fields to collect his man and after showing the governor the magistrates' order for the delivery of the prisoner to him had been taken to the cells by the turnkey. There they found Williams hanging from a clothes rail by his neckerchief; he had not been dead long. The turnkey had not noticed any great depression of spirits in the prisoner when he had locked him up the previous night, but his confinement had caused him to lose a good deal of flesh.

The death of Williams left the identity of the murderer of the Marrs and the Williamsons still uncertain. Unless more evidence had been forthcoming it is difficult to see how the magistrates could have committed him for trial, and his suicide might not have been the act of a guilty man anxious to avoid an end on the scaffold but of an innocent one driven to it by the anguish of a false accusation. The public had no doubt that Williams was the monster responsible for all the murders, and the magistrates gave no indication that they were of a different opinion. Confirmation that the public view was right came a fortnight after his death when a French knife with an ivory handle which the magistrates had been told belonged to Williams but which had disappeared, was found by officers from Shadwell pushed down a mousehole behind a heap of dirty clothes in a closet in Mrs. Vermilion's house. It was bloodstained. About the same time a lodger in the house discovered amongst some old clothes a blue jacket belonging to Williams on which was coagulated blood in such a position that it might very well have got there at the time John Turner saw the murderer bending over Mrs. Williamson and transferring money from her pocket to his own.

Such confirmation was not required by the inhabitants of Shadwell and Wapping, as they had shown when Williams was buried on the first day of the New Year.

On the evening before, the High Constable of the Parish of St.

George and other officials, including Mr. Harrison, the Collector of Taxes, took the body from the prison at Coldbath Fields by hackney coach to the parish watchhouse, known as the Roundabout. Next morning they put it on a sloping platform on a cart so that it lay full in view on a steep incline, with the head to the horse's tail and wearing blue pantaloons, a white shirt with the sleeves rolled up, and stockings. The famous maul was fastened perpendicularly on one side of the head, the ripping chisel on the other, whilst the iron crowbar which had been found under the body of Mr. Williamson was laid above the head, transversely, with the stake which was to be driven through the body parallel to it.

At 10.30 a.m. the procession moved off from the watchhouse, led by six men on grey horses—the Constable of Shadwell, the Collector of Taxes, a baker, a coalmerchant, a stationer, and the Superintendent of Lascars of the East India Company. Other officials followed, including the beadle of St. George's in his uniform. After them came the cart with its macabre burden, followed by a large muster of constables and an immense crowd of the inhabitants of Shadwell and Wapping.

The procession took a route which led it past the houses of the Marrs and the Williamsons, at each of which it paused for some time. Every window along the route was crowded with spectators but there was no disorder, although there were shouts of execration when the cart stopped, and at one place a hackney coachman gave the body two or three cuts with his whip and used an ejaculation which the *Morning Courier* thought it " unnecessary to repeat." The cavalcade reached the junction of Cannon Street Road and Ratcliff Highway at about half past twelve. The body was pushed out of the cart and crammed into a hole in the middle of the cross-roads too small to take it at full length. The stake was then driven through the corpse amidst the jeers of the multitude, the hole was filled up and the crowd dispersed, no doubt to the great relief of the magistrates and their men as in those days riots were always a danger if a crowd collected.

Such unedifying scenes at the burial of a suicide were not uncommon in Hanoverian England—the hero of Stevenson's *St. Ives* describes a similar procession he encountered on his journey south from Edinburgh—but the interment of Williams was exceptional in taking place in daylight in a populous area and above all in the mixed feelings of relief and hatred which animated those who watched it. The terror which held the East End in its grip for so many fevered days was over, and the magistrates and constables of Thames and Shadwell could once again give their undivided attention to petty thieves and brawling sailors.

# *Fit for Human Consumption*

By J. C. SMITH, *Barrister-at-Law*

The decision of a Divisional Court in *J. Miller, Ltd.* v. *Battersea Borough Council* [1955] Crim.L.R. 779 that a chocolate cream bun containing a piece of metal is not " unfit for human consumption " within section 9 (1) of the Food and Drugs Act, 1938, is, at first sight, surprising. There can be little doubt that such a bun is not fit for the purpose for which it is required—which seems, inevitably, to be " human consumption "—within section 14 (1) of the Sale of Goods Act, 1893. In *Chaproniere* v. *Mason* (1905) 21 T.L.R. 633, 634, Collins M.R. " was inclined to say "—and Denning L.J. thinks he was " unduly hesitant " ([1954] 1 Q.B. 598, 607)—that a bath bun containing a stone was not reasonably fit " for the purpose of being eaten by the process of mastication " ; though the Master of the Rolls was not prepared to go so far as to hold that no reasonable jury could arrive at a verdict to the contrary.

Furthermore, in *Fisher* v. *Barnett & Pomeroy* (*Bakers*), *Ltd.* [1954] Crim.L.R. 212, a Divisional Court allowed the prosecution's appeal when a charge was brought under section 9 (1) alleging that a bread roll containing part of a cigarette was unfit for human consumption. It is true that the real question in that case related to the third party proceedings under section 83 (3) of the Act and the point now being considered was not argued ; but it is nevertheless relevant to note that the court sent the case back to the Chief Metropolitan Magistrate " with an intimation that the information was a perfectly good information, that the offence was proved by the prosecution *under the combined sections* [9 (1) and 83 (3)]. . . ."

Stones, cigarette ends and pieces of metal seem equally objectionable articles to find in buns ; yet Lord Goddard C.J. in the instant case seems to have thought that, quite apart from the implications of the context of section 9 (to be considered below), the bun could not fairly be described as unfit for human consumption ; and he implied that the magistrate's holding that it was so unfit showed a failure to use that " certain modicum of common sense " which has to be used in construing a statute like the Food and Drugs Act. In view of the cases considered above—neither of which appears to have been cited in the Divisional Court—this seems, with respect, a little hard on the magistrate.

The Lord Chief Justice's view was that "the bun was perfectly good. It had in it this metal which ought not to have been there, and therefore it can be said that metal to the prejudice of the purchaser was in the bun, but that does not make the bun unfit for human consumption"; and, that where a Christmas pudding contains threepenny pieces, "the threepenny pieces are not fit for human consumption, but the pudding is." [1] This argument seems to be the same as that which was rejected by the Court of Appeal in *Wilson* v. *Rickett Cockerell & Co., Ltd.* [1954] 1 Q.B. 598. The defendants had sold the plaintiff a ton of Coalite containing a detonator which exploded and injured the plaintiff's property. The plaintiff alleged that the Coalite was unfit for the purpose for which it was supplied—burning—while the defendant argued that the Coalite as such was all right and that the trouble was caused by something which the plaintiff had not purchased.

The fallacy in the defendant's argument was clearly exposed by Denning L.J. (at p. 606):—"Coal is not bought by the lump. It is bought by the sack or by the hundredweight or by the ton. The consignment is delivered as a whole and must be considered as a whole; not in bits. A sack of coal, which contains hidden in it a detonator, is not fit for burning, and no sophistry should lead us to believe that it is fit." Both Evershed M.R. and Denning L.J., in arriving at the conclusion that the Coalite was unfit for burning, relied upon and clearly approved of Collins M.R.'s dictum in *Chaproniere* v. *Mason*, so it is fairly clear that Lord Goddard's argument would not have found favour if this had been a civil proceeding under section 14 (1) of the Sale of Goods Act. The analogies drawn by the Lord Chief Justice, of the game with the metal pellets in it, or the plum pudding containing threepenny pieces, are not really in point if, as he says, "one expects to find the shot," or "someone says: 'Look out, do not swallow the threepenny pieces.'" One does not expect to find pieces of metal in chocolate cream buns.

Nevertheless, even if it be accepted that Lord Goddard's argument is fallacious and that the phrase, "unfit for human consumption," considered out of context, might reasonably be held to cover this case, it is submitted with respect that the decision of the court was clearly right. Their Lordships were not content to rely on the natural meaning of the words of the section but based their decision upon an examination of the statute as a whole. They observed that the offence under section 3, of selling food not of the nature or substance or quality demanded by the purchaser, contemplated a case of this sort; for section 4 provides that it shall be a defence to a charge under section 3 " where the food . . . in question contains some extraneous matter " for the defendant to prove that the presence of that matter was an unavoidable consequence of the process of collection or preparation. No such defence is provided under section 9 and yet the penalties under that section are more severe. It is not uncommon for the same act to be an offence under each of two sections of the same statute which provide for the imposition of sentences of varying severity (see Lord Alverstone C.J. in *Goulder* v. *Rook* [1901] 2 K.B. 290, 296); and indeed according to Bell (*Sale of Food and Drugs*, 12th ed., 111) there are occasions when a sale of food can be an offence under both section 9 and section 1 or section 3. The sale for human consumption of liquor containing methylated spirit is said to be such an offence, though no authority is cited. It is clear that no argument could have been based merely on the fact that this was an offence under section 3; but the fact that there was *a defence* which might be available to the charge under section 3 made all the difference. Parliament cannot reasonably be supposed to have intended to make the same act an offence under each of two sections in the same statute when the section imposing the *lesser* penalties provides for defences which are not available under the section imposing the greater. If the act is clearly within the terms of the section imposing the lesser penalty—as in this case it was within section 3—the plain implication is that it is not within the terms of the other. And so the court held. Whether or not the defence was open to the accused in this case was irrelevant to this argument and was not, of course, considered. Whether or not the bun would be held unfit for consumption in a civil court, this was not the kind of unfitness contemplated by section 9.

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[1] A few days after *Miller's* case, in *Turner & Sons, Ltd.* v. *Owen* [1955] Crim.L.R. 779, the Divisional Court quashed a conviction under s. 9 where the defendant had sold bread with a bit of string in it. The Lord Chief Justice referred to *Miller's* case and said: "The cream bun was perfectly good as a cream bun, and so here, this Hovis loaf was perfectly good as a loaf."

The argument which was successful in this case could not be advanced on a charge under section 9 for selling, for example, rotten meat. This would presumably be an offence under section 3 as well, but, where the " unfitness " takes this form, there does not appear to be any defence available on a charge under section 3 which would not also be available under section 9. Bell's example of the liquor containing methylated spirit is more doubtful. If the methylated spirit is extraneous matter, it would seem that this is an offence under section 3 and, moreover, an offence of the class for which the defence provided by section 4 is available, and, following the instant case, it cannot, therefore, be an offence under section 9. Similarly it appears clear that the direction to the magistrate in *Fisher* v. *Barnett & Pomeroy (Bakers), Ltd.* was wrong, and that case must be considered to have been decided *per incuriam.*

The case is a valuable illustration of the importance of reading a statute as a whole, and of the dangers of looking at one section in isolation from the rest. It is unfortunate, however, that a decision which could well have been rested simply on a question of construction was supported by reasoning which has been discredited in the Court of Appeal.

# *A Scottish Survey*

By J. Aikman Smith, B.A.(Oxon.), LL.B.(Edin.)
*Advocate, Sheriff-Substitute of Roxburgh, Berwick and Selkirk*

## Prosecutions

### *Public prosecution*

In Scotland the police do not prosecute and private individuals do so very rarely. These are two of the most obvious features which distinguish the Scottish system of prosecution from the English. In the Scottish view the ends of justice are best served by the provision in every criminal court of a professional prosecutor appearing in the public interest and personally unconcerned with the outcome of the cases which he presents. Our method of criminal administration has now concentrated in the hands of the Lord Advocate, acting through his subordinates in the Crown Office in Edinburgh and in every Sheriffdom, an almost exclusive right to prosecute all except the most petty crimes and offences.

It was not always so. Originally the prosecution of crime was carried through by the injured party, both for his private interest and *ad vindictam publicam.* But private prosecution has long been out of favour here, for reasons which Hume, a century and a half ago, described as, first, the accepted interest of the Crown in all fines and confiscations, and, second, the popular opinion that justice should be evenly distributed to all and that the subject should be protected from malicious and vindictive prosecution by private individuals. The modern Scottish lawyer would probably add as a further reason that the system of public prosecution has worked extremely well. Those who have held the high office of Lord Advocate have used their discretion wisely. It is evidence of public confidence in the system that in modern practice it is virtually unknown, except in minor matters, for a private citizen to seek to assert his right to initiate criminal proceedings.

### *The Lord Advocate*

The Lord Advocate is, of course, the principal Law Officer of the Crown in Scotland, and he has many duties in addition to those concerned with criminal administration. His office is of great antiquity. In the fifteenth century he was known as the "King's Advocate," and to this day all Scottish indictments proceed at the instance of "Her Majesty's Advocate." The Lord Advocate has full power to prosecute all crimes committed in Scotland. Again, to quote Hume, he is "the public accuser who insists in the name of the King, and for His Majesty's interest in the execution of his laws, and in the tranquillity and welfare of his people."

In the exercise of his powers in relation to criminal proceedings the Lord Advocate is assisted by the Solicitor-General for Scotland and four Advocates Depute. The Solicitor-General is, by his commission, vested with all the powers of the Lord Advocate in criminal matters. If the office of Lord Advocate is vacant, indictments may be taken at the instance of the Solicitor-General. Both the Lord Advocate and the Solicitor-General are Ministers of the Crown and normally have seats in Parliament.

### *Advocates Depute*

The Advocates Depute are appointed by the Lord Advocate. They hold their commissions from him and not from the Crown, and their appointments are personal to him. He is responsible for their actions as for his own. For purposes of criminal administration Scotland is divided into four districts, designated the Home, the North, the South and the West Circuits. One Advocate Depute is assigned to each. With the exception of the Home Advocate Depute, who is normally a Q.C., the Advocates Depute are junior members of the Faculty of Advocates. They are appointed on a part-time basis and are free to carry on private practice at the Bar, though not of course in criminal cases. The two Law Officers and these four Advocates Depute are collectively known as Crown Counsel. The Lord Advocate also appoints an Extra Advocate Depute for the limited purpose of prosecuting in the second court, which is usually required when the High Court sits in Glasgow, and a Sheriff Court Advocate Depute, who is available to conduct those cases in the Sheriff Courts in which the Lord Advocate wishes counsel and not the local prosecutor to represent the Crown.

In prosecutions in the High Court in Edinburgh the Lord Advocate or the Solicitor-General normally appears in person. If neither is available the case is conducted by the Advocate Depute on the Home Circuit. So far as possible one of the Law Officers represents the Crown in all appeals before the High Court, but if neither can do so the Advocate Depute for the Circuit from which the case has come appears instead. When the High Court goes on Circuit the Advocates Depute conduct the prosecutions. Apart from appearing for the Crown in the High Court the main duties of the Advocates Depute lie in considering the cases reported to them from their respective Circuits and deciding what action, if any, should be taken.

### *Procurators Fiscal*

Throughout the country the Lord Advocate's executive officers are the Procurators Fiscal, one of whom is appointed to every Sheriff Court district. There are at present 26 full-time Procurators Fiscal. These must be advocates or qualified solicitors, and they are recruited by the Civil Service Commissioners. The whole-time Procurator Fiscal Service is part of the Legal Civil Service. In addition there are 19 solicitors in less populous areas who are appointed by the Lord Advocate to act as Procurators Fiscal on a part-time basis.

The Procurators Fiscal are the public prosecutors in the Sheriff Court. They normally conduct all prosecutions, both summary and on indictment, though in some important cases the Lord Advocate instructs the Sheriff Court Advocate Depute to do so.

It is the duty of the Procurator Fiscal to inquire into all suspected crimes and offences occurring in his district. Usually he learns of these from the police and in his further investigations he may avail himself of police assistance. It is not, however, the business of the police to say whether or not a prosecution is to be taken. That is a matter for the Procurator Fiscal to decide, if necessary after reference to Crown Counsel.

In the majority of cases the Procurator Fiscal makes his own decision. All summary prosecutions in the Sheriff Court proceed at his instance. If, however, he is in any doubt as to the action which should be taken in any case, or if the case is serious and may necessitate proceedings on indictment, he reports the case as fully as he can to Edinburgh for the consideration and directions of Crown Counsel. Crown Counsel then decides such questions as whether or not a prosecution is warranted, whether it should be summary or on indictment, and, if the latter, whether it should proceed in the High Court or the Sheriff Court.

The Procurator Fiscal's inquiry is called a precognition, and is made by taking the declarations of such persons as have knowledge of the facts and circumstances of the case. If witnesses refuse to give information he may seek the assistance of a magistrate. The magistrate can cite witnesses to attend for precognition, and, if they prove contumacious, can commit them to prison. Such compulsive measures are, however, seldom necessary in practice.

The Procurator Fiscal has the further important duty of inquiring into all sudden and suspicious deaths occurring in his district. There are no coroners in Scotland and nothing which resembles a coroner's inquest. The inquiry into such deaths is treated as private and confidential, and the result is reported to the Crown Office for consideration by Crown Counsel. Crown Counsel may then order no proceedings, or may instruct the Procurator Fiscal to bring a criminal charge. In cases thus reported Crown Counsel approve a schedule setting forth the cause of death for transmission to the Registrar of Deaths.

In the exercise of his functions the Procurator Fiscal is highly privileged. There is a strong presumption that he is doing his duty honestly and in bona fide. He is not liable in damages for his official actions unless it be proved he acted maliciously and without probable cause.

### *Crown Office*

The Crown Office is the headquarters from which the criminal administration of Scotland is directed. It has as its permanent head an official known as the Crown Agent, who acts in an administrative and executive capacity under the Lord Advocate. He and his Principal Assistant are qualified solicitors. His position is obviously of great importance to the successful working of the system. Law Officers come and go, and so do Advocates Depute. A change of Government normally is followed by a complete change of Crown Counsel personnel. In preserving the continuity of criminal administration the Crown Agent plays an invaluable part. Accumulated in his hands is a great volume of decision and precedent readily available to Crown Counsel and local Procurators Fiscal when required.

The Crown Agent is the essential link between the Lord Advocate of the day and the Procurators Fiscal. It is to him that the latter forward their reports for submission to the Advocates Depute. All instructions to the Procurators Fiscal are transmitted by him.

### *Minor courts*

Such, in outline, is the Scottish system of public prosecution as it operates in the High Court of Justiciary and the Sheriff Courts. In the Burgh Police Courts and the Justice of the Peace Courts, which deal only with minor crimes and offences (see [1955] Crim.L.R. 95), the system of public prosecution also prevails. In the former, town councils appoint a " burgh prosecutor," and in the latter the justices appoint an official known as the " J.P. Fiscal." Petty offences which the police consider fall within the restricted jurisdiction of these courts are reported to the appropriate prosecutor who then decides what action should be taken.

### *Private prosecution*

The right of the private citizen to prosecute still exists in Scotland but not as it is understood in England. Whereas in English theory, with certain exceptions, it is open to any member of the public to institute criminal proceedings, there being no need for such a prosecutor to have an interest in the subject-matter of the charge. in Scotland a private individual can only institute a prosecution at common law if he can establish such an interest, and then only with the concurrence of the appropriate public prosecutor. Thus if a member of the public wishes to prosecute in the High Court he must first seek the consent of the Lord Advocate. The latter, however, does not have an absolute right of veto. In the most recent of the very few reported cases of private prosecution at common law, *J. & P. Coats* v. *Brown,* 1909 S.C.(J.) 29, the Lord Advocate refused to concur but the High Court authorised the case to proceed without his concurrence.

The criminal law of Scotland, it should be noted in this connection, is still almost entirely common law. There are no Scottish statutes corresponding, for example, to the Larceny Act or the Offences against the Person Act. It can safely be said that the right to prosecute privately for crimes at common law has for centuries been so little exercised that it has ceased to be of any practical importance.

There are, however, certain statutes which do occasion a few private prosecutions in the Sheriff Courts. Private prosecutions are sometimes taken for contraventions of the Merchandise Marks Acts and the Merchant Shipping Acts. They also still occur in connection with poaching offences under the Day Trespass (Scotland) Act, 1832, and such other statutes as the Salmon Fisheries (Scotland) Act, 1868, and the Tweed Fisheries Act, 1859. When imprisonment without the option of a fine is competent for such statutory offences the private prosecutor cannot proceed without first obtaining the concurrence of the Procurator Fiscal.

### *Some advantages of the Scottish system*

By English standards criminal administration in Scotland is very highly centralised. In some respects the control of the Scottish Crown Office may be likened to that of the Director of Public Prosecutions. The latter is, however, concerned, as adviser or as prosecutor, with only a small proportion of the cases which come before the courts. In Scotland, on the other hand, no trial on indictment can proceed except at the instance of the Lord Advocate. Every serious case is therefore reported to the Crown Office and each receives the personal attention of an Advocate Depute, if not of a Law Officer of the Crown. In Scotland, moreover, Government Departments do not prosecute but report their cases to the Crown Office for action by the appropriate public prosecutor. In fact the Lord Advocate and his subordinates in the Crown Office and the Procurator Fiscal Service have been entrusted with nearly all the functions in criminal matters exercised in England by such public officials as the Director of Public Prosecutions and his staff, the Treasury Solicitor, the solicitors to various Ministries and coroners.

Practical advantages can be claimed for this concentration of responsibility. It is convenient and economical, and it makes possible a high degree of uniformity in criminal procedure throughout the Scottish courts. The system encourages impartiality and efficiency in the conduct of criminal proceedings. The primary duty of a British prosecutor is not to obtain convictions but to assist the court to reach just decisions. It is obviously difficult for a police or private prosecutor to present his case with complete impartiality and detachment. An independent public prosecutor can do so much more easily. Again, a higher standard of efficiency is to be expected from the specialist in prosecution than from the practitioner who is only occasionally called upon to conduct a criminal case. Prosecution in Scotland benefits greatly from the existence of trained prosecutors with independent public status and professional traditions.

The system also is well adapted to maintain principles which are strongly held in Scotland. It is, for example, a cardinal rule that all publicity in the earlier stages of Scottish criminal proceedings must be avoided in order that the accused may not be prejudiced at his trial. Public opinion is content to leave to the investigation and decision of the Procurators Fiscal and Crown Counsel those matters which in England necessitate preliminary inquiries before magistrates. Again, it is widely felt in Scotland that public inquests on sudden deaths can cause needless suffering to the bereaved and may also result in prejudice against an accused person if criminal proceedings follow. The public interest on such occasions is, it is thought, sufficiently protected by the confidential inquiry carried out by the Procurator Fiscal and his subsequent report to the Crown Office.

# *Practice and Procedure*

## Quarter Sessions

*Effect of order made by quarter sessions on appeal*

At p. 41 of the January issue of the Review " A. J. C." makes some interesting observations on my practice note at [1955] Crim. L.R. 767.

For his argument that quarter sessions cannot entertain an application to remove a disqualification ordered by them on appeal he relies on section 31 of the Summary Jurisdiction Act, 1879, and section 86 of the Magistrates' Courts Act, 1952, " read together." With all respect to " A. J. C." section 31 has nothing to do with this matter. As amended by the Summary Jurisdiction (Appeals) Act, 1933, and the Criminal Justice Act, 1948, it concerns the procedure to be followed on appeal from a magistrates' court and the powers which quarter sessions may exercise " by their order " on determination of an appeal.

As to section 86 of the Act of 1948, " A. J. C.'s " argument seems to assume that it confers concurrent powers of enforcement of orders made on appeal upon quarter sessions and magistrates' courts. That, however, is not so. Section 86 does not confer any jurisdiction on quarter sessions. The powers conferred by it on magistrates' courts are expressed to be " without prejudice to the powers of the court of quarter sessions to enforce the decision." That those powers exist is clearly implied. They are indeed inherent in the status of a court of record. The purpose and advantage of conferring power on a magistrates' court to enforce an order of quarter sessions made on appeal, is that the magistrates' court has a convenient machinery for the purpose which quarter sessions lacks.

The other point raised by " A. J. C." is subject to different considerations from an application to remove a disqualification. Section 80 (5) of the Criminal Justice Act, 1948, deems a probation order or order of conditional discharge made on appeal to have been made by the court from which the appeal was brought. This is not " without prejudice to the powers of quarter sessions " and would seem to exclude the latter's jurisdiction. The fact that quarter sessions has no case committee may possibly be an explanation of this exception.

For these reasons and having regard to the general principle involved, I remain of opinion that it would be inappropriate for a magistrates' court to entertain an application to remove a disqualification imposed on appeal at quarter sessions even if it has the jurisdiction to do so. [Brigadier A. C. C. Willway, C.B., C.B.E., T.D., D.L., Chairman, Surrey Quarter Sessions.]

## Magistrates' Courts

### *Distraint on a car*

Distress warrants are frequently issued to enforce payment of fines but it is not often that the police have to proceed as far as distraint. Defendants of any substance usually prefer to pay in cash rather than have their goods impounded. When the police have actually to levy distress unfamiliar technicalities may therefore have to be studied—as was the case in recent proceedings in a Metropolitan magistrates' court.

The defendant had been convicted on two charges of failing to stop after an accident and on a charge of causing unnecessary obstruction with a motor-vehicle. In addition, as he had failed to appear when bailed on a warrant issued after he had ignored a summons, his recognisance was estreated. In all, he was ordered to pay, with costs, a total of £16 2s., and he asked for time to find this sum.

The circumstances of his conviction for obstruction were that his car—an old one—had broken down on the road; he had not been able to get a garage to undertake the necessary repairs at a price which suited him, so he had left the car where it was for three days. Eventually the police had had to tow it away to the police station, and it was still there when the case was heard.

Section 69 (1) of the Magistrates' Courts Act, 1952, obliges a court to grant time for the payment of any fine imposed unless special circumstances justify not doing so. Subsection (5) of this section provides, however, that this requirement is not to affect the power to issue a distress warrant to enforce payment. The car in question was admitted by the defendant to be his own property, not subject to any hire purchase agreement. Accordingly, distress warrants were issued forthwith in respect of the unpaid sums and, by virtue of these the police were able to impound legally what they had previously taken into unofficial custody.

The ignition key and registration book were not with the vehicle, but when the defendant called a few days later to inquire about the possibility of selling the car privately, he was persuaded to surrender them. At the same time he offered a 10s. note from his wallet as a part payment of the amount due; the police inspected the wallet and found £5 in it. This sum was seized by virtue of the warrants which, as required by rule 43 of the Magistrates' Courts Rules, 1952, authorised the taking of money as well as goods. It seems to follow necessarily from the terms of a distress warrant that search may be made of a defendant's person for his money and goods; so the police, if circumstances had required it, could have taken the ignition key forcibly from the defendant. It is doubtful, however, whether the registration book could have been impounded as " goods."

By Rule 43 (5) of the Magistrates' Courts Rules any distress levied is to be sold " within such period beginning not earlier than the sixth day after the making of the distress as may be specified in the warrant, or if no period is specified in the warrant, within a period beginning on the sixth day and ending on the fourteenth day after the making of the distress." A proviso enables a defendant to consent to a sale before the beginning of the specified period, but it does not appear that he can authorise a sale later than the fourteenth day after the distress has been made. However, there seems nothing to prevent the court fixing a later date in the warrant. Rule 43 (6) prescribes that distress is to be sold by public auction " or in such other manner as the person against whom the distress is levied may in writing allow." The sale of the car in question was delayed as long as possible to give the defendant an opportunity of finding either the money or a private buyer who would offer a better price than the car in its broken down condition was likely to fetch at an auction sale. Eventually, however, the car had to be put up for auction, and, somewhat to the surprise of those concerned, it was knocked down for a sum which exceeded, after all charges were paid, the balance due from the defendant. As required by Rule 43 (10) of the Magistrates' Courts Rules, 1952, the police officer who executed the warrant delivered to the clerk of the court a written account of the costs and charges incurred, and he returned the surplus to the defendant, pursuant to Rule 43 (9).

As a result of the court's action the defendant has ceased, for the time being, to be a motorist, but, in view of his attitude to his responsibilities towards other road users this hardly seems a matter for regret. [A. E. JONES.]

## *Summary Justice*

### *Animals*

Dogs. Permitting carcasses of two pigs, who seemed to have died through fighting, to remain unburied in a field to which dogs could gain access contrary to the Dogs Act, 1906, s. 6; fined £1, ordered to pay £1 9s. costs; Wells: West Riding Magistrates' Court (*Wakefield Express,* November 5, 1955).

### *Assault and disorderly behaviour*

Assault. Assaulting a county court bailiff executing a warrant of commitment; sentenced to a month's imprisonment; Milland: Leeds City Magistrates' Court (*Yorkshire Evening Post*, December 9, 1955).

Assault. Two men and a woman assaulting bailiff executing warrant of eviction against a council house tenant; each fined £5, ordered to pay £2 2s. costs; Lewis, Bounsall, Witham: Stratford Magistrates' Court (*Evening Standard*, January 4, 1956).

### *Aviation*

Acrobatics. Carrying out acrobatic flight over a populous area; fined £20, ordered to pay 5 guineas costs; Lovegrove: Camberley Magistrates' Court (*The Times,* December 9, 1955).

### *Drugs*

Unlawful possession. Being in unauthorised possession of Indian hemp; fine of £25 substituted for sentence of three months' imprisonment on appeal; Radix; Liverpool Quarter Sessions (*Liverpool Evening Express*, December 1, 1955) (see [1955] Crim. L.R. 768).

### *Factories*

Defective equipment. Man using an electric hammer without proper plug, the bare wire-ends being plugged into electric wall socket, electrocuted; employers fined £25; Callaghan, Callaghan: Liverpool City Magistrates' Court (*Liverpool Evening Express*, December 8, 1955).

*Fire*

Chimney. Allowing chimney of his council house accidentally to catch fire; fined 10s.; Garrett: Kettering Magistrates' Court (*Northamptonshire Evening Telegraph*, December 28, 1955).

False alarm. Two schoolboys, aged fourteen and thirteen, making false calls to the fire brigade; first fined £5, second, £2, the maximum penalty because of his age: Birkenhead Juvenile Court (*Liverpool Evening Express*, December 8, 1955).

*Firearms, explosives and offensive weapons*

Firearms. Youth firing air pistol in a pedestrian subway; fined £2 for discharging a pistol to the public danger; Clark: Brentford Magistrates' Court (*Evening Standard*, January 2, 1956).

*Food and drugs*

Unregistered premises. Man using wash-house for boiling shrimps; said all the shrimps went to wholesalers who rewashed and recooked them; fined £5 for using unregistered premises for preparing preserved food; Rankin: Southport Magistrates' Court (*Liverpool Evening Express*, December 23, 1955).

*Gaming*

Pitch-and-toss. Four men playing pitch-and-toss on a street corner; each fined £1; McDonald, Tullett, Woods and Doyle: Birmingham Magistrates' Court (*Birmingham Mail*, December 5, 1955).

*Intoxicating liquor*

Young persons. Youth, aged seventeen, purchasing intoxicating liquor for himself and boy, aged sixteen, the latter aiding and abetting him; fined £2, younger boy fined £1; Tomlinson: Birmingham Magistrates' Court (*Birmingham Mail*, December 1, 1955).

*Larceny, etc.*

Larceny. Man, aged seventy-four, stealing holly; previous convictions; fined £5, sentenced to three months' imprisonment; Turner: Bexhill Magistrates' Court (*The Times*, December 24, 1955).

Theft by bailee. Man selling six gramophone records which he had borrowed from his son-in-law; fined £1, ordered to pay £3 2s. 10d. costs; France: Wakefield West Riding Magistrates' Court (*Wakefield Express*, November 5, 1955).

Passports. Man making false statements in order to obtain a passport, woman, aged nineteen, forging a passport; former fined £15, latter put on probation for two years; Leah, Prescott; Hyde Magistrates' Court (*News Chronicle and Daily Dispatch*, December 16, 1955).

### *Local by-laws*

Taxis. Taxi-driver refusing to drive three soldiers to their camp, which was within the borough, on a Sunday night summoned by council; fined £2; Franklin: Reading Magistrates' Court (*Evening Standard*, January 2, 1956).

### *Nuisance*

Soot. Chimney sweep accumulating soot on his premises, causing nuisance to his neighbours; fined £1, ordered to dispose of soot within twenty-eight days, after which he would become liable to a further fine of £2 for each day on which the nuisance continued; Thompson: Chesterfield Borough Magistrates' Court (*Yorkshire Post*, December 16, 1955).

### *Poaching*

Three men poaching, killing game on a Sunday and killing game without a licence; each fined £5 for each offence; Walker, Walker and Morris: York Magistrates' Court (*Yorkshire Evening Post*, November 3, 1955).

### *Public entertainment*

Cinema. Failing to exhibit at cinema a sufficient percentage of British films during two quota periods; company fined £200, ordered to pay 30 guineas costs; Wardona Cinemas (Swanscombe), Ltd.: Dartford Magistrates' Court (*Manchester Guardian*, December 30, 1955).

### *Railways and ships*

Railways. Attempting to board a train while it was in motion; fined £1; Leach: Southend Magistrates' Court (*Evening Standard*, December 13, 1955).

Railways. Carrying a loaded firearm, a 12-bore double-barrel shotgun, on railway property; fined £2; Sullivan: Enfield Magistrates' Court (*Evening Standard*, December 19, 1955).

Railways. Pulling communication cord, leaving carriage between stations and trespassing on railway lines; fined £5 for first offence, 10s. for each of the other two, ordered to pay 9s. costs; Cassells: Wellingborough Magistrates' Court (*Northamptonshire Evening Telegraph*, November 18, 1955).

Illegal trawling. Boulogne trawler illegally trawling inside the three-mile limit in Rye Bay; master fined £20 in August, 1954, for a similar offence; fined £75, committed to prison pending payment of the fine and fishing gear aboard the trawler confiscated; Leprete: Lewes Magistrates' Court (*Manchester Guardian*, December 7, 1955).

Ships. Four men boarding ship without the master's authority before the crew had been signed off; evidence that persons had been boarding ships from East and inducing seamen to desert; each fined £10; Meah, Meah, Meah and Ullah: Salford Magistrates' Court (*Manchester Guardian*, December 13, 1955).

### *Road traffic*

Disqualification. Man who had been a provisional licence holder but who said he had never had the opportunity of taking a driving test driving without due care and attention; fined £7, disqualified from driving until he had taken driving test, fined £1 for driving without a licence, ordered to pay £4 17s. costs; Dinsdale: Burton County Magistrates' Court (*Derby Evening Telegraph*, December 21, 1955).

Special reason. Army lorry driver falling asleep while driving and hitting a stationary car; had just come off 48 hours' guard duty; fined £2 for careless driving; special reason for not endorsing his licence; Lodge: Woking Magistrates' Court (*The Times*, December 3, 1955).

Licence. Learner motor-cyclist carrying a pillion passenger who was not a full licence holder, the passenger aiding and abetting him; motor-cyclist fined £2, passenger fined £1; Sharman, Barlow: Kettering Magistrates' Court (*Northamptonshire Evening Telegraph*, December 28, 1955).

Lighting. Using a spot lamp on a lorry when there was neither fog nor any snow falling; fined £1; Allen: Cambridge Magistrates' Court (*Peterborough Citizen and Advertiser*, November 25, 1955).

Logbook. Pigkeeper failing to keep records of his journeys in his van; did not think he was required to keep logbook as pigkeeping came under Ministry of Agriculture; fined £1; Roughton:

Market Harborough Magistrates' Court (*Northamptonshire Evening Telegraph*, November 23, 1955).

*Sale and trade*

Exporting prohibited goods. Exporting £31,000 worth of prohibited types of kale seed; managing director and company each fined £3,750, ordered to pay 100 guineas costs; Cundy, Cundy and Son, Ltd.: Thames Magistrates' Court (*The Times*, December 6, 1955).

Weights and measures. Coalman wilfully defrauding householders by giving short measure of coal and misrepresenting weight of sacks of coal; sentenced to three months' imprisonment; Howells: Birmingham Magistrates' Court (*Birmingham Mail*, December 1, 1955).

# Case and Comment

The reports of cases to which initials are appended hereunder have been specially prepared for *The Criminal Law Review* by the following reporters:—

HENRY PALMER, *Barrister-at-Law.*
J. D. PENNINGTON, *Barrister-at-Law.*

**Abduction**—*Necessity of persuasion or inducement*

R. *v.* COLVILLE-HYDE [1] (Devon Assizes: Finnemore J.: November 1, 1955).

P. a fifteen-year-old schoolgirl, fell in love with the defendant, who was living apart from his wife. They exchanged passionate love-letters, without the knowledge of P.'s parents. P. told the defendant that her father had repeatedly committed incest with her since she was twelve. One afternoon, she arrived at the defendant's flat, saying she had left home because of her father. He agreed to take her in, but first drove her round to her home to leave a note for her parents. On their return to the flat, P. recognised her father's cycle outside the gate, and refused to go in. She became hysterical. The defendant eventually drove her off to Dartmoor. They stayed there for three weeks, living in the car. She threatened to kill herself if he took her home. Later, she alleged that the defendant had had carnal knowledge of her three times. Finally he arranged for a friend to take her home, and he went to the police. He was charged with unlawful carnal knowledge, and abduction.

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[1] For the defendant: *O. Thomas* (instructed by Campion, Symons & Co.). For the Crown: *D. H. Stansfeld* (instructed by Director of Public Prosecutions).

Finnemore J. directed the jury that there was no case to answer on the charge of abduction. "There must be some action on the part of the person charged. It is not enough if he merely acquiesces. There must be something in the nature of a persuasion or an inducement." The contention on behalf of the Crown that it was necessary to distinguish between merely receiving a girl into the house, where her consent was relevant, and physical removal, as in a car, where it was irrelevant, was not accepted.

The defendant was acquitted on both charges.

[A. Rupert Tyrrell, LL.B.]

COMMENTARY. This follows settled authority: see, *e.g.*, *R.* v. *Jarvis* (1903) 20 Cox 249, where it was held that if the accused passively yields to the girl's suggestion he is entitled to an acquittal.

See also Archbold, 33rd ed., 1081 *et seq.*

**Accomplice**—*Grievous bodily harm.* See R. *v.* HILTON AND OTHERS, p. 122, below.

**Arson**—*Proof—evidence to go to the jury*

R. *v.* FITZAUCHER [2] (Manchester Assizes: Ashworth J.: December 7, 1955).

The defendant was charged with arson. He was a wholesaler of sweets and confectionery and had recently purchased premises suitable for combined warehouse, office and dwelling accommodation. The premises had been insured and a small part of his stock transferred there, when a fire occurred doing about £300 worth of damage. Three individual fires had been started. Counsel for the prosecution presented his case on the basis that F. started the fires with paraffin at about 12.30 p.m. on April 29. Counsel for the defence, admitting that the fire was deliberate, submitted that there was no case to answer, since the case for the prosecution had been confined to a fire started at 12.30 p.m. and this was inconsistent with the evidence of witnesses.

*Held*, that, in the absence of authority, as there was evidence of a fire caused either by the accused or by an intruder and as the prosecution had called evidence to exclude the possibility of an intruder causing the fire, the issue as to whether the accused caused the fire must be tried.

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[2] For the defendant: *D. N. Pritt Q.C.*, *Christmas Humphreys*, *H. Nuttall* (instructed by Philip Conway, Thomas & Co.). For the Crown: *J. di V. Nahum Q.C.*, *W. G. Morris* (instructed by the Town Clerk, Rochdale).

F. was acquitted.

[John Ward, *Barrister-at-Law*.]

COMMENTARY. On an indictment under section 3 of the Malicious Damage Act, 1861, it must be shown that the accused maliciously set fire to a house, etc., with intent to injure or defraud. It is seldom that there can be direct proof of wilful burning by the accused so that the jury have to rely on circumstantial evidence. This was not such a case that " the whole of the structure upon which the prosecution has been built up to that moment collapses and falls " (see *per* Lord Goddard C.J. in *R.* v. *Abbott* [1955] 3 W.L.R. 369, 375), since there was evidence of a deliberate fire caused either by the accused or an intruder and further evidence excluding an intruder.

See Archbold, 33rd ed., 854 *et seq.*

**Bail**—*Excessive bail—application for habeas corpus*

*Ex p.* THOMAS [3] (Q.B. Divisional Court: Lord Goddard C.J., Pearson J.: December 16, 1955).

T. was charged with the robbery of 3s. on December 4, 1955, at Clapham Common. He appeared before the magistrate on Monday, December 5, 1955, when there was an adjournment for seven days, T. being held in custody. On the adjourned preliminary hearing on December 12, 1955, counsel appeared on behalf of T. Owing to the pressure of other court work the preliminary hearing was again adjourned for seven days. Bail was at first refused, but on representation being made by counsel to the learned magistrate, bail was granted in T.'s recognisance of £100 and one other surety of £500. This bail was so excessive as to make it impossible for T. to avail himself of it. Application was, therefore, made *ex parte* to the Divisional Court for a writ of habeas corpus on the grounds that the imposition of such excessive bail amounted to a grant of no bail and contravened the Bill of Rights, 1688, and thus made T'.s imprisonment unlawful.

*Held*, that the correct procedure had been adopted in the circumstances. It was further stated that in the eighteenth and early nineteenth centuries habeas corpus was often used for the purpose of obtaining bail. The application was adjourned until after the further hearing in the magistrates' court in order that notices might be served. Counsel was asked to request the learned magistrate either to reduce the amount of bail sought or to acquaint the High Court with his reasons for imposing such high bail. The magistrate accepted bail of £100 and one surety of £100 and the application for habeas corpus was dismissed.

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[3] For the applicant: *L. King Lassman* (instructed by Martin Samuels, Lipson & Co.).

[M. A. Colm Lassman, *Barrister-at-Law*.]

COMMENTARY. In *Ex p. Speculand* [1946] K.B. 48 it was held that a judge of the Queen's Bench Division has no inherent jurisdiction to reduce the amount of bail where the justices, in the exercise of their statutory powers, have fixed bail in a specified sum.

There is apparently no reported case of habeas corpus being sought on the grounds of excessive bail, although there have been cases where the Divisional Court has remitted a case with an instruction to admit to bail, *e.g., R.* v. *Manning* (1888) 5 T.L.R. 139. It further appears that no provision has been made for the questioning of the imposition of excessive bail.

### **Bail**—*Person with criminal record*

R. *v.* GENTRY [4] (Court of Criminal Appeal: Lord Goddard C.J., Hallett and Pearson JJ.: December 12, 1955).

G. was convicted at quarter sessions of garage breaking and stealing and sentenced to eight years' preventive detention. The magistrates had granted G. bail and he had committed another offence while on bail and left the country. G. was thirty-one years of age and had had eight previous convictions. He had twice been given Borstal training, had been sent to an approved school, and had served sentences of ten months' imprisonment and four years' corrective training. When he absconded he joined a ship bound for South America but, owing to bad weather, the ship returned to an English port, where he was arrested. He applied to the Court of Criminal Appeal for leave to appeal against his sentence.

*Held*, that the application was refused.

*Per* Lord Goddard C.J.: As the court had said on many previous occasions, it was inadvisable to grant bail to men with long criminal records, as G. had, unless there was very real doubt as to the man's guilt.

*Per* Lord Goddard C.J., further: It is remarkable how prone quarter sessions are to sentence men to eight years' preventive detention. It might be because the court had said that was the minimum except for old people. If this continued the preventive detention establishments would be filled with people who might be serving ordinary imprisonment. In a case such as the present the prisoner might just as well have been given a long sentence of imprisonment. [H. P.]

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[4] The applicant did not appear and was not represented. The Crown was not represented.

COMMENTARY. This is the third case in recent months in which the Court of Criminal Appeal has criticised the granting of bail: see *R.* v. *Pegg* [1955] Crim.L.R. 308; *R.* v. *Wharton* [1955] Crim.L.R. 565. See also p. 73, above.

As to the length of sentences of preventive detention see [1955] Crim.L.R. 269.

**Evidence**—*Arson.* See R. *v.* FITZAUCHER, p. 118, above.

**Evidence**—*Corroboration—direction to jury*

R. *v.* BROAD [5] (Court of Criminal Appeal: Lord Goddard C.J., Hallett and Pearson JJ.: December 12, 1955).

B. was convicted of an offence of gross indecency and applied to the Court of Criminal Appeal for leave to appeal against his conviction on the ground that the jury were misdirected. The passage in the summing-up dealing with corroboration was as follows: " The law says there must be corroboration in a material particular, and the corroboration here is the evidence the accused himself has given in the witness box and what he says in his statement. He does corroborate, first, that he was present with Hope in the car, and that is corroboration in a material particular; he corroborates that he did lay his hand on Hope's thigh, and that is corroboration in a material particular; and he does admit he said to Hope, ' Do you object? ' and Hope said, ' I do not mind what you do,' and that is corroboration in a material particular; and you may think there is corroboration in this case and that Hope was to some extent a consenting party. You will, nonetheless, pay proper regard to his evidence."

*Held,* dismissing the application, that it was not for the Chairman but for the jury to decide, first, whether they accepted the evidence and, second, whether that evidence constituted corroboration or not. The latter point should have been expressly left for the jury to decide, but since the court was fully satisfied that there had been no miscarriage of justice the application would be dismissed. [H. P.]

**Evidence**—*Shopbreaking.* See R. *v.* AYRES, p. 129, below.

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[5] The applicant did not appear and was not represented. The Crown was not represented.

**Fraudulent Conversion**—*Matters to be proved*

R. *v.* BRYCE [6] (Court of Criminal Appeal: Lord Goddard C.J., Hallett and Pearson JJ.: December 19, 1955).

B. was convicted at East Kent quarter sessions on four counts of fraudulent conversion. The facts were, shortly, that B. offered to do gardening work for a number of people, and obtained payments on account on the pretext that he would have to buy materials. He then, apparently, used the money for his own purposes. B. appealed to the Court of Criminal Appeal against his conviction on the ground that there was no evidence that the money was entrusted to him for a specific purpose, or, if there was, the jury were not directed on that point.

*Held,* allowing the appeal, that where the charge is one of fraudulent conversion, three things must be proved: (i) that the money was entrusted to the accused for a particular purpose; (ii) that the accused used it for some other purpose; and (iii) that such misuse of the money was fraudulent and dishonest. In this case there was no real direction to the jury on the first point, and there were some passages in the summing-up which might have referred to a case of false pretences. Further, the court doubted whether there was any evidence of an entrusting for a specific purpose. There was no fraudulent conversion on the facts of this case, and the conviction would, therefore, be quashed. [H. P.]

**Grievous Bodily Harm**—*Wounding with intent—parties to a plan*

R. *v.* HILTON, CRITCHLEY, LYTHE AND GREATREX [7] (Manchester Assizes: Ashworth J.: December 20, 1955).

The four defendants were in a club. A man stepped back and accidentally knocked into a waitress spilling some beer she was carrying. H. told him to be more careful and sharp words passed between them. At closing time the man went into the toilet in the basement having told someone else he feared trouble downstairs. The four defendants followed him. In the toilet the man was beaten by H. with some encouragement from G.; C., with L. at his side, guarded the door to prevent help reaching the victim. A friend of the victim's came down and at his insistence C. stopped H. attacking the man. H., G. and C. left the club and the victim was taken to hospital, having suffered grievous bodily harm.

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[6] For the appellant: *D. West Russell* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *Michael Parker* (instructed by R. P. Tunstall, Maidstone).

[7] For the Crown: *T. A. Cunliffe, G. Carman* (instructed by the Town Clerk, Manchester). For H.: *A. Gibb* (instructed by the court). For C.: *K. Burke* (instructed by T. H. Hinchcliffe & Son, Manchester). For L.: *Lionel A. Cohen* (instructed by F. E. Monks & Co., Manchester). For G.: *T. P. Russell* (instructed by J. A. Hancock, Manchester).

Before the closing speeches of counsel were made, Ashworth J., saying that he had consulted his brethren on the point, ruled that he would ask the jury whether they were satisfied that H. was guilty of wounding with intent to do grievous bodily harm ; whether they were satisfied that the other accused were party to the plan to attack the man ; whether they were similarly satisfied that the others intended to cause grievous bodily harm ; and direct the jury that if they were satisfied that the others were party to the plan to attack the man, but were not satisfied that the others intended to cause him grievous bodily harm, then the jury should only convict them of unlawful wounding.

H. was convicted of wounding with intent to do grievous bodily harm and sentenced to four years' imprisonment. C. and G. were convicted of unlawful wounding ; C. was sentenced to three years' imprisonment and G. to three years' corrective training. L. was acquitted.

[John Ward, *Barrister-at-Law.*]

COMMENTARY. The distinction between the offences committed in this case is to be found in the difference between sections 18 and 20 of the Offences against the Person Act, 1861. Section 18 creates a felony and covers wounding or causing any grievous bodily harm to any person with intent either to maim, disfigure, disable, do some other grievous bodily harm or resist or prevent lawful arrest. Section 20 creates a misdemeanor and covers wounding or inflicting any grievous bodily harm but the specific intents contained in section 18 do not have to be shown; instead it must be shown that the wounding was malicious, and here, as elsewhere, " malicious " does not mean that there must necessarily be spite or ill-feeling.

See Archbold, 33rd ed., 1000 *et seq.*

**Habeas corpus**—*Excessive bail.* See *Ex p.* THOMAS, p. 119, above.

**Local Government**—*Member of council—pecuniary interest*

D. P. P. *v.* GIBBS [8] (Seabrook Magistrates' Court: Sir Charles Tuff, Chairman: August 18, 1955).

The defendant, the chairman of an urban district council, was charged with voting on a matter in which he had a pecuniary interest, contrary to section 76 of the Local Government Act, 1933.

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[8] For the prosecution: *A. G. Flavell* (instructed by the Director of Public Prosecutions). For the defendant: *Lord Hailsham Q.C., Roland Brown* (instructed by Kingsford, Flower & Pain, Ashford).

In 1948 or 1949 the council had voted an allowance of £160 to the chairman to meet the expenses of his office. In 1954 the defendant was elected chairman. Before the annual meeting in May, 1955, at which the members were to elect the chairman for the ensuing year the defendant had apparently anticipated that there would be two nominations for the chairmanship, one candidate from each party, and that he would be nominated by his colleagues. He accordingly consulted the clerk of the council before the meeting as to the procedure to be adopted, and was advised that if events transpired as he anticipated, neither he, the chairman, nor the other anticipated candidate, who was the vice-chairman, should preside, but that a temporary chairman should be elected to preside during the election. The clerk further advised that it would be in order for the defendant to vote for himself. Votes cast at previous elections indicated that the candidates had voted for themselves and no objections had been raised. A temporary chairman presided over the meeting for the purpose of electing the chairman, and when the votes were counted, there were twelve votes for the defendant and eleven for the other candidate, who agreed that, unlike the previous year, he had not voted for himself. The defendant was accordingly elected chairman by a majority of the votes cast. In a statement to the police the defendant said that although he realised he could not preside and exercise a casting vote in his own favour, he thought that having vacated the chair he could vote as an ordinary member. Referring to the provisions of section 76 of the Local Government Act, 1933, he pointed out that he had not taken part in any discussion, because there was none, and that it did not occur to him that he had a duty to disclose anything, as it was well known to every member of the council that there was an allowance towards expenses paid to the chairman, the amount of which was also known, and that neither the allowance nor the amount was under discussion. He also said it was not a financial advantage to be the chairman, but rather the opposite.

*Held*, the defendant was guilty. He was granted an absolute discharge on the payment of four shillings costs, the magistrates being satisfied that in acting as he did the defendant was not influenced by any question of personal gain.

[R. Sefton Sidle, *Clerk to the Justices*.]

COMMENTARY. The effect of section 76 of the Local Government Act, 1933, was considered in the article by Mr. J. F. Garner [1956] Crim.L.R. 34–38.

**Magistrates**—*Clerk—consultation with justices*

R. *v*. BRADFORD CITY JUSTICES, *ex p*. MURANYI [9] (Q.B. Divisional Court: Lord Goddard C.J., Hallett and Pearson JJ.: December 20, 1955) (*The Times*, December 21, 1955).

M. applied for an order of certiorari to quash a bastardy order on the ground that the clerk to the justices had influenced the justices' decision. Leave to move for the order was given on an affidavit, which was made by counsel in the case, in which it was submitted that the clerk had dictated to the magistrates what they should do.

*Held* that, although *R*. v. *East Kerrier Justices* ([1952] 2 Q.B. 719) laid down that it was undesirable for a clerk to retire with the justices as of course, in the present case it was clear from the affidavits made by the justices and the clerk that the justices consulted the clerk on the question of corroboration, which they were entitled to do; accordingly, the application would be dismissed. [J. D. P.]

COMMENTARY. A full statement of the principles which govern when justices should consult their clerk was made by Lord Goddard C.J. at the end of 1953: see [1954] Crim.L.R. 44.

**Murder**—*Provocation—unfaithful wife*

R. *v*. NUTTALL [10] (Court of Criminal Appeal: Lord Goddard C.J., Hallett and Pearson JJ.: December 19, 1955) (*The Times*, December 20, 1955).

N. was convicted at Manchester Assizes of the murder of his wife. The facts, shortly, were that N. and his wife had been living apart for some time. On the day in question, N. met his wife in a public-house with the object of persuading her to come back to him. The wife refused because N. had, on many occasions, been cruel to her. After drinking for some time in the public-house, they went to a place where there were apparently some sexual acts between them. The wife still refused to return to N., whereupon N. killed her because he knew, or thought he knew, that she had formed other attachments. N. appealed to the Court of Criminal Appeal against his conviction on the ground that the judge, when dealing with the question of provocation, misdirected the jury in asking whether a reasonable man would, if he so lost control, be guilty of manslaughter. It was submitted that the judge ought to have used the word "might" instead of the word "would."

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[9] For the applicant: *F. S. Laskey* (instructed by Piesse & Sons for Cawthron, Priddin & Read, Bradford). For the justices: *Rodger Winn* (instructed by Wood, Bowie & Co. for Hammond & Co., Bradford).

[10] For the appellant: *Robertson Crichton Q.C., B. H. Gerrard* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *Fenton Atkinson Q.C., C. T. B. Leigh* (instructed by the Director of Public Prosecutions).

*Held*, dismissing the appeal, that the difference between "would" and "might" was really verbal and, in any event, having regard to the decision of the House of Lords in *Holmes* v. *Director of Public Prosecutions* [1946] A.C. 588, there was really no question of manslaughter to be left to the jury. If the trial judge had refused to leave manslaughter to the jury, this court would probably have upheld him. The court could see no evidence which could possibly have justified N. killing his wife. Mere unfaithfulness by a woman could not reduce murder to manslaughter. The divorce court was open to all. There was, therefore, no ground for interfering with this conviction. [H. P.]

COMMENTARY. The test of whether provocation is sufficient to reduce murder to manslaughter was reconsidered by the House of Lords in *Bedder* v. *D. P. P.* [1954] Crim.L.R. 721, and the test of "the reasonable man" was there reiterated. See also [1954] Crim.L.R. 740–754 and the criticism of the application of the test at [1954] Crim.L.R. 898–906.

A mere suspicion of adultery is not sufficient to reduce a killing to manslaughter: *R.* v. *Millward* (1931) 23 Cr.App.R. 119.

**Prostitution**—*Injunction to prevent prostitution on certain premises*

*Ex p.* THOMPSON-SCHWAB AND WINGATE [11] (Chancery Division: Wynn-Parry J.: December 14, 1955) (*The Times*, December 15, 1955).

On an application by two residents in a street in Mayfair for an injunction, pending the trial of an action, to restrain C. and S. from using or permitting a house in the street to be used for the purposes of prostitution, counsel for the defendants objected that there was nothing unlawful in prostitution and that the court had no jurisdiction to prevent an individual by injunction from following that occupation.

*Held*, that there was evidence that the active trade of prostitution was being carried on at the premises in question, that the two defendants were using the premises for that purpose, and that this was interfering with the plaintiffs' enjoyment of their properties; accordingly, an injunction would be granted. [J. D. P.]

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[11] For the plaintiffs: *Maurice Berkeley* (instructed by Reynolds, Gorst & Porter). For the defendants: *I. J. Lindner Q.C.*, *B. B. Stenham* (instructed by Tarlo, Lyons & Co.).

**Road Traffic**—*Disqualification—removal with regard to particular class of vehicle*

R. *v*. COTTERELL [12] (Cardiff Assizes: McNair J.: November 16, 1955) ([1955] 1 W.L.R. 70; [1955] 3 All E.R. 817).

In 1954, C., having pleaded guilty to a charge of dangerous driving, was sentenced to a fine and was disqualified for driving any class of motor-vehicle for five years. At the time of imposing the disqualification, the court intimated that, if after one year the court were satisfied that C. had been of good behaviour, the sentence of disqualification might be varied to permit C. to drive a motor-cycle. After a year C., having been of good behaviour, applied under section 7 (3) of the Road Traffic Act, 1930, for the disqualification to be varied so as to permit him to drive a motor-cycle.

*Held* that, although the facts justified the exercise of discretion in favour of varying the disqualification, section 7 (3) only empowered the court to remove the disqualification altogether or to refuse the application; accordingly, the application must be refused. [J. D. P.]

COMMENTARY. The material words of section 7 (3) are: "A person who . . . is disqualified . . . may . . . apply to the court . . . to remove the disqualification, and . . . the court may . . . either by order remove the disqualification . . . or refuse the application." There are no words giving the court a power to vary a disqualification.

**Sentence**—*Disparity between sentences of two persons convicted of same offences*

R. *v*. RICHARDS [13] (Court of Criminal Appeal: Lord Goddard C.J., Hallett and Pearson JJ.: December 12, 1955).

R. was convicted, together with her mother, at quarter sessions of offences of obtaining money by false pretences. R. was sentenced to four years' imprisonment and the mother (who had been convicted on more counts than R.) was sentenced to two years' imprisonment. R. applied to the Court of Criminal Appeal for leave to appeal against her sentence.

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[12] For the applicant: *John Rutter* (instructed by Edward Lewis, James & Possart, Cardiff). For the Crown: *J. F. Coplestone-Boughey* (instructed by Director of Public Prosecutions).

[13] For the applicant: *Derek Curtis-Bennett Q.C., Cyril Williams* (instructed by Frank & Caffin, Truro).

*Held*, that the court would treat the application as an appeal and would reduce the sentence. It was not a necessary ground for interfering with a sentence where there were two prisoners that one prisoner had too light a sentence; what had to be shown was that the sentence of the prisoner appealing was too heavy. Here the daughter was given a sentence twice as great as the mother, and the disparity was one which the court ought to take into account. Although the court was of the opinion that R. deserved a sentence of four years, in the circumstances the sentence would be reduced to one of three years' imprisonment. [H. P.]

**Sentence**—*Preventive detention.* See R. *v.* GENTRY, p. 120, above.

**Sentence**—*Preventive detention—substitution of term of imprisonment*

R. *v.* MIDDLEWEEK [14] (Court of Criminal Appeal: Lord Goddard C.J., Hallett and Pearson JJ.: December 19, 1955) (*The Times*, December 20, 1955).

M. pleaded guilty at Essex quarter sessions to housebreaking and larceny and was sentenced to seven years' preventive detention. M. had had nine previous convictions, his longest sentence being one of four years' imprisonment from which he was released in October, 1953. After his release, M. obtained work with a firm of building contractors who sent him to Canada. He applied for naturalisation in Canada and on disclosing his criminal record was sent back to England. He was working at the time when he committed the present offence. He appealed to the Court of Criminal Appeal against his sentence.

*Held*, that, in the opinion of the court, this was not a case for preventive detention. M. had made a real effort to go straight after his release from prison in October, 1953. If he had stayed in Canada he might have made a new life for himself, but, on his disclosing his past, he had been sent back to England. It was a curious circumstance that the Commonwealth countries could deport English criminals back to England, but English courts could not deport Commonwealth criminals back to their own countries. If M. went to preventive detention, there was really no hope for him; the sentence of seven years' preventive detention would, accordingly, be set aside and one of four years' imprisonment substituted. [H. P.]

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[14] The appellant appeared in person. The Crown was not represented.

**Sentence**—*Suicide.* See R. *v.* FRENCH, below.

**Shopbreaking**—*Evidence—civil trespass*

R. *v.* AYRES [15] (Court of Criminal Appeal: Lord Goddard C.J., Hallett and Pearson JJ.: December 5, 1955) (*The Times*, December 6, 1955).

A., who was seventeen years of age, was convicted with two others at London Sessions of breaking and entering a shop and stealing therein twelve ice creams and two bottles of mineral water; she was sentenced to two years' probation. A. applied to the Court of Criminal Appeal for leave to appeal against her conviction on the main ground that there was no case to go to the jury. Although she had acted unlawfully in getting into the shop, A. had only committed a civil trespass and there was no evidence of breaking although she might have accepted an ice cream.

*Held*, that the application should be treated as an appeal and the conviction quashed. The chairman should have pointed out that going on to property was only a civil wrong and that there was no evidence of shopbreaking. [H. P.]

COMMENTARY. For an indictment for shopbreaking to succeed there must be proof of a " breaking and entering "; mere entry upon premises is not enough.

See, further, Archbold, 33rd ed., 667 *et seq.*, 680 *et seq.*

**Suicide**—*Attempted suicide—sentence*

R. *v.* FRENCH [16] (Court of Criminal Appeal: Lord Goddard C.J., Hallett and Pearson JJ.: December 12, 1955) (*The Times,* December 13, 1955).

F., having been convicted by magistrates of larceny and attempted suicide, was sentenced at the Stoke-on-Trent quarter sessions to two years' imprisonment for each offence, the sentences to run consecutively. At the sessions the recorder accepted that the attempt was a serious attempt by F. to take his life and not mere exhibitionism, and said that an attempt to commit suicide was a very serious crime indeed. F. appealed to the Court of Criminal Appeal against his sentence.

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[15] For the applicant: *J. B. Frankenburg* (instructed by Anthony Leader & Co.). The Crown was not represented.

[16] The applicant did not appear and was not represented. The Crown was not represented.

*Held*, allowing the appeal in part, that whereas it would not be right to regard attempted suicide as a trivial offence, it was not a very serious crime. Whether it was a sin or not was not a matter for the courts. Suicide had been made a crime at common law to enable the Crown in the old days to obtain forfeiture of the suicide's goods. The court would treat the appeal as applying only to the sentence for attempted suicide and would substitute a nominal sentence of one month's imprisonment to be served concurrently, so that the total sentence would be reduced from four years' imprisonment to two years'. [H. P.]

COMMENTARY. Attempted suicide is a common law misdemeanour for which there is no fixed maximum punishment. The sentence is at discretion but should not be inordinate: *R.* v. *Morris* [1951] 1 K.B. 394; however, a longer sentence than two years should only be imposed in serious cases of common law misdemeanours: *R.* v. *Higgins* [1952] 1 K.B. 7.

### **Witnesses**—*Procedure for calling—subpoena issued by the Crown Office*

*Ex p.* COMMISSIONERS OF CUSTOMS AND EXCISE[17] (Q.B. Divisional Court: Lord Goddard C.J., Hallett and Pearson JJ.: December 20, 1955) (*The Times*, December 21, 1955).

The Commissioners, wishing to call T. as a witness in proceedings in connection with certain transactions relating to cigarette lighters, served him with a subpoena issued by the Crown Office. On T. failing to obey the subpoena, the Commissioners applied to the Divisional Court for a writ of attachment for contempt.

*Held*, that although the court would grant leave for the writ to issue, it did not wish to encourage the Commissioners to use the Crown Office procedure, which cost a great deal of money, in every case; a witness summons was just as effective and could be speedily and easily enforced by justices. [J. D. P.]

COMMENTARY. Arrest is the sanction under both procedures; a writ of attachment may be issued for disobedience to a subpoena, whilst a warrant for arrest may be issued by justices if a summons is not answered to: see R.S.C., Ord. 37, r. 13; Magistrates' Courts Act, 1952, s. 77.

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[17] For the Commissioners: *Rodger Winn* (instructed by Solicitor, Commissioners of Customs and Excise).

# *Acts and Orders*

## Aliens

ALIENS' EMPLOYMENT ACT, 1955 (4 Eliz. 2, c. 18): operative December 21, 1955. An alien may be employed in any civil capacity under the Crown if he is appointed in any country or territory outside the United Kingdom, the Channel Islands and the Isle of Man and is employed in service of a class or description which appears to the responsible Minister to be appropriate for the employment of aliens, or if a certificate in respect of his employment, issued in accordance with the provisions of section 1 by the responsible Minister with the consent of the Treasury, is for the time being in force. British protected persons may be employed in any civil capacity under the Crown.

Regulation 60D of the Defence (General) Regulations, 1939, is revoked, but any alien who immediately before the commencement of the Act was employed under the Crown by virtue of the regulation in the United Kingdom, the Channel Islands or the Isle of Man is to be treated as if a certificate in respect of his employment had been issued immediately after the commencement of the Act.

See EXPIRING LAWS CONTINUANCE ACT, p. 132, below.

## Armed Forces

ARMY ACT, 1955 (COMMENCEMENT) ORDER, 1955 (S.I. No. 1805); AIR FORCE ACT, 1955 (COMMENCEMENT) ORDER, 1955 (S.I. No. 1806); REVISION OF THE ARMY AND AIR FORCE ACTS (TRANSITIONAL PROVISIONS) ACT, 1955 (APPOINTED DAY) ORDER, 1955 (S.I. No. 1807): all made December 1, 1955. All three Acts except section 1 of the Revision of the Army and Air Force Acts (Transitional Provisions) Act, 1955, which continues the Army Act and the Air Force Act in operation until December 31, 1956, and is already operative, will come into force on January 1, 1957. See [1955] Crim.L.R. 440, 441.

See COURTS-MARTIAL APPEAL (AMENDMENT) RULES, p. 132, below.

## Birds

See WILD BIRDS (LADY ISLE SANCTUARY) ORDER, p. 137, below.

### British Commonwealth

West African (Appeal to Privy Council) Order in Council, 1955 (S.I. No. 1822): operative on a day to be determined. The Order in Council of 1949 (S.I. 1949 I, p. 4752) will cease to apply to Nigeria when the Federal Supreme Court of Nigeria assumes its functions. No appeal will lie from the Federal Supreme Court to the Privy Council.

African Territories (Imperial Statute Extension) (Amendment) Order, 1955 (S.I. No. 1823): operative December 7, 1955. The Order of 1936 (S.R. & O., No. 572) no longer applies to the Cameroons under United Kingdom Trusteeship, other provision having been made for the extension of certain provisions of the Evidence Act, 1851, to them.

See Emergency Laws (Miscellaneous Provisions) (Colonies, Etc.) Order in Council, p. 133, below; Police (Overseas Service) (Cyprus) Regulations, p. 136, below.

### Children and Young Persons

See Cinematograph (Children) Regulations, p. 138, below.

### Continuance of Offences

Expiring Laws Continuance Act, 1955 (4 Eliz. 2, c. 22): operative December 21, 1955. The following provisions, *inter alia*, are continued in force until December 31, 1956: Aliens Restriction (Amendment) Act, 1919, s. 1 (continuance of emergency powers under Aliens Restriction Act, 1914, s. 1 (1)); Road Traffic Act, 1934, s. 1 (speed limit in built-up areas); Population (Statistics) Act, 1938; Education (Exemptions) (Scotland) Act, 1947. The following provisions are continued until March 31, 1957: Rent of Furnished Houses Control (Scotland) Act, 1943; Furnished Houses (Rent Control) Act, 1946.

### Courts-Martial

Courts-Martial Appeal (Amendment) Rules, 1955 (S.I. No. 1883): operative January 1, 1957. Rule 19 of the Rules of 1952 (S.I. No. 194), is amended in consequence of the replacement of section 15 of the Courts-Martial (Appeals) Act, 1951, by section 138 of the Army Act, 1955, and section 138 of the Air Force Act, 1955.

## Defence Regulations

Regulation 60D of the Defence (General) Regulations, which permitted the employment of certain aliens under the Crown in civil capacities, was revoked by the Aliens Employment Act, 1955, see p. 131, above. The Defence (Sale of Food) Regulations, 1943, were revoked and re-enacted by the Food and Drugs (Amendment) Act, 1954 (see [1955] Crim.L.R. 51), which came into force on January 1, but which was immediately replaced by the Food and Drugs Act, 1955 (see [1956] Crim.L.R. 63).

SUPPLIES AND SERVICES (CONTINUANCE) ORDER, 1955 (S.I. No. 1810): operative December 9, 1955; EMERGENCY LAWS (CONTINUANCE) ORDER, 1955 (S.I. No. 1813): operative December 1, 1955. The Defence Regulations set out in the White Paper (Cmd. 9615) are continued in force for a further year until December 10, 1956. Except for the revocations noted above the regulations continued are the same as were continued until December 10, 1955.

EMERGENCY LAWS (MISCELLANEOUS PROVISIONS) (COLONIES, ETC.) ORDER IN COUNCIL, 1955 (S.I. No. 1814): operative December 1, 1955. The governors of the Bahamas, Cyprus, Jamaica, Kenya, the Leeward Islands, Trinidad and Tobago may by order provide for the continuation in force until December 10, 1956, of Defence Regulations in their territories.

## Food and Drugs

FOOD AND DRUGS AMENDMENT ACT, 1954 (APPOINTED DAY) ORDER, 1955 (S.I. No. 1898): operative December 16, 1955. The Food and Drugs Amendment Act, 1954 ([1955] Crim.L.R. 50) came into operation on January 1, 1956. The Food and Drugs Act, 1955 ([1956] Crim.L.R. 63), as a consequence came into operation on the same day immediately afterwards.

FOOD STANDARDS (BUTTER AND MARGARINE) REGULATIONS, 1955 (S.I. No. 1899); LABELLING OF FOOD (AMENDMENT) REGULATIONS, 1955 (S.I. No. 1900); MINERAL OIL IN FOOD (AMENDMENT) REGULATIONS, 1955 (S.I. No. 1901); FOOD HYGIENE REGULATIONS, 1955 (S.I. No. 1906): all operative January 1, 1956. These Regulations result from the coming into force of the Food and Drugs Act, 1955, and, *inter alia*, replace with modifications provisions previously contained in the Food and Drugs Act, 1938.

Standards are prescribed for butter and margarine similar to those previously contained in section 32 of the Food and Drugs Act, 1938.

The Labelling of Food Order, 1953 (S.I. No. 536), which has effect as if made under the Food and Drugs Act, 1955, is amended to include requirements relating to the labelling, marking and advertising of margarine and margarine-cheese similar to those previously contained in sections 32 (2) and 33 of the Food and Drugs Act, 1938. A label or advertisement may not claim that margarine contains or is made with cream or milk except in the formula " made with (cream or milk), milk-fat equivalent to —% of butter."

The Act of 1955, which continues in force the Mineral Oil in Food Order, 1949 (S.I. No. 614), includes chewing compounds in the definition of food; the prohibition in the Order forbidding the use of mineral oil in the preparation of food has ceased to apply to chewing gum and other products of a like nature and use which contain not more than 12·5 parts by weight of microcrystalline wax per 100 parts by weight of chewing compound and no other mineral oil.

The Food Hygiene Regulations contain a number of new provisions concerning the hygienic handling of food and replace section 13 of the Food and Drugs Act, 1938, and regulations 19–21 of the Public Health (Meat) Regulations, 1924 (S.R. & O., No. 1432). The provisions include requirements as to the cleanliness of food premises and stalls, apparatus and equipment, the hygienic handling of food, the cleanliness of persons handling food, the construction, repair and maintenance of food premises, and the temperature at which certain foods that are particularly liable to transmit disease are to be kept in food premises. It is an offence for the occupier of any food premises to fail to comply with the requirements as to the structure of, or provision of fixtures at or in, the premises, or if he or the owner of a vehicle used for the transport of meat or the owner of any food business carried on, at, or from a stall fails to provide the equipment prescribed. It is an offence for any person engaged in the handling of food to fail to comply with any other provision of the regulations. The occupier of food premises, or the owner of any food business carried on at or from a stall or any other person for the time being having the control or management of a food business who fails to take all reasonable steps to secure compliance with the regulations by any person employed by him or under his control is guilty of an offence. The maximum penalty for such offences is a fine of £100 or three months' imprisonment or both; if the offence continues after conviction a further fine not exceeding £5 may be imposed for each day on which it so continues.

Section 113 of the Food and Drugs Act, 1955, which concerns contraventions due to some person other than the person charged, applies to contraventions of the Regulations.

WELFARE FOODS (GREAT BRITAIN) AMENDMENT (No. 2) ORDER, 1955 (S.I. No. 1796): operative December 1, 1955. The Order of 1954 (S.I. No. 1401; [1954] Crim.L.R. 947) is amended and the charges for milk supplied to beneficiaries are altered.

## Highways

OPEN-CAST COAL (HIGHWAY) ORDERS (REVOCATION) (No. 2) ORDER, 1955 (S.I. No. 1902): operative December 31, 1955. Six orders made by the Minister of Fuel and Power under regulation 16 of the Defence (General) Regulations, 1939, stopping up certain highways are revoked.

## Housing

See EXPIRING LAWS CONTINUANCE ACT, p. 132, above.

## International Law

DIPLOMATIC IMMUNITIES RESTRICTION ACT, 1955 (4 Eliz. 2, c. 21): operative December 21, 1955. Her Majesty may by Order in Council withdraw personal diplomatic immunities from members of the diplomatic missions of foreign Powers if such immunities are not reciprocated. No person who is a citizen of the United Kingdom and colonies is entitled to such immunities unless he enjoyed them by virtue of an office in respect of which he was accepted on behalf of Her Majesty at any time before the commencement of the Act.

## London

The following Orders have been made detailing prescribed routes: S.I. 1955, Nos. 1777 (Sevenoaks); 1926 (Fulham).

The following Orders have been made restricting waiting: S.I. 1955, Nos. 1778 (Grays); 1895 (Redhill, Surrey).

LONDON CAB ORDER, 1955 (S.I. No. 1853): operative January 1, 1955. The Secretary of State may appoint an Assistant Commissioner of Police of the Metropolis to grant cab licences and cab-drivers' licences.

### Magistrates' Courts

The following Order has been made altering petty sessional divisions: S.I. 1955, No. 1881 (Cornwall).

### Merchant Shipping

MERCHANT SHIPPING (SAFETY CONVENTION COUNTRIES) (VARIOUS) (No. 2) ORDER, 1955 (S.I. No. 1803): operative December 9, 1955. The German Federal Republic, Republic of Cuba, Principality of Monaco and Dominican Republic have accepted the Safety Convention.

### Police

POLICE (No. 2) REGULATIONS, 1955 (S.I. No. 1913): operative December 16, 1955. The scales of pay and allowances for men and women police officers of ranks from constable to chief inspector have been increased to those shown in the following tables. The figures in brackets show the rates for women officers.

*Pay*

| | Yearly minimum | Yearly maximum |
|---|---|---|
| Constable | £475 (£425) | £640 (£575) |
| Acting Sergeant | £650 | £650 |
| Sergeant | £675 (£605) | £735 (£660) |
| Station Sergeant | £750 | £770 |
| Inspector (except City of London and Metropolitan Police) | £800 (£720) | £860 (£775) |
| Chief Inspector (except City of London and Metropolitan Police) | £910 (£820) | £960 (£865) |

*Overtime allowances*

| | |
|---|---|
| Constable | 6s. 9d. (6s. 2d.) |
| Sergeant | 7s. 10d. (7s. 1d.) |

*Detective duty allowance*

| | |
|---|---|
| Constable | £51 (£46) |
| Sergeant | £59 (£53) |
| Inspector | £69 (£62) |

POLICE (OVERSEAS SERVICE) (CYPRUS) REGULATIONS, 1955 (S.I. No. 1852): operative December 10, 1955. Provision is made for the appointment, discipline, resignation and discharge of members of the Cyprus Police Unit.

## Post Office

INLAND POST WARRANT, 1955 (S.I. No. 1877): operative January 1, 1956. The Warrant of 1947 (S.R. & O. No. 2663), as amended, is revoked and the regulations concerning the inland post and the postal service between Britain and the Republic of Ireland are consolidated. The principal changes are alterations in postal rates and charges.

## Probation

PROBATION (No. 2) RULES, 1955 (S.I. No. 1800): operative December 10, 1955. The pay of whole-time women probation officers is to be increased on January 1 in each year until it equals the pay of male probation officers and not on May 1 as previously prescribed.

## Road Traffic

MOTOR VEHICLES (VARIATION OF SPEED LIMIT) REGULATIONS, 1955 (S.I. No. 1880): operative December 14, 1955. The Regulations of 1950 (S.I. No. 1705) which, with certain exceptions, exempted from the speed limit of 30 m.p.h. goods vehicles which were motor-cars or motor-cycles fitted with pneumatic tyres and not drawing trailers, are revoked. Vehicles constructed or adapted for the carriage both of passengers and of goods, being vehicles the unladen weight of which does not exceed two tons and which either fulfil the conditions as to construction specified in the Schedule to the Regulations or are so constructed or adapted that the driving power of the engine is or can be transmitted to all the wheels, are to be treated for the purposes of speed limits as if they were passenger vehicles.

For penalties for offences, see section 10 of the Road Traffic Act, 1930.

See EXPIRING LAWS CONTINUANCE ACT, p. 132, above.

## Scotland

*Birds*

WILD BIRDS (LADY ISLE SANCTUARY) ORDER, 1955 (S.I. No. 1854): operative December 24, 1955. Lady Isle in the county of Ayr is declared a bird sanctuary. It is an offence to kill, injure or take any wild bird or to take or destroy its eggs or to attempt to do so. No person except someone so authorised in writing by the Scottish Society for the Protection of Wild Birds may enter Lady Isle at any time.

For penalties for offences, see section 12 (2) of the Protection of Birds Act, 1954.

Article 7 of the Wild Birds Protection (County of Ayr) Order, 1954 (S.I. No. 31), which prohibited the taking or killing of any wild bird or the taking or destroying of their eggs on Lady Isle, is revoked.

*Expiring laws continuance*

See p. 132, above.

*Police*

POLICE (SCOTLAND) AMENDMENT (No. 2) REGULATIONS, 1955 (S.I. No. 2003): operative December 16, 1955. The scales of pay and allowances for men and women police officers of ranks from constable to chief inspector have been increased as in the English police forces. See p. 136, above.

*Theatre and Cinematograph*

See CINEMATOGRAPH (CHILDREN) (SCOTLAND) (No. 2) REGULATIONS, below.

### Theatre and Cinematograph

CINEMATOGRAPH (CHILDREN) (No. 2) REGULATIONS, 1955 (S.I. No. 1909); SCOTLAND (S.I. No. 1912): both operative January 1, 1956. The earlier Regulations of 1955 (S.I. Nos. 1131, 1138; [1955] Crim.L.R. 585) are revoked and replaced. The provisions of the new Regulations are the same as those contained in the previous ones, but are limited in their application to cinematograph exhibitions other than those given in a private dwelling-house to which the public are not admitted, whether on payment or otherwise, and exempted exhibitions within the meaning of section 5 of the Cinematograph Act, 1952.

# Books and Periodicals

**Reviews:**

*Mens Rea in Statutory Offences.* By J. Ll. J. Edwards, M.A., LL.B., PH.D., Barrister-at-Law, Reader in Law in the Queen's University of Belfast. London: Macmillan & Co., Ltd. 1955. xiv and 258 and (tables, bibliography and index) 39 pp. (21s. net.)

This is an important work of synthesis of a topic whose significance to the citizen, the legislator and the lawyer it has become hackneyed to stress. Everyone acquainted with the operation of the criminal law appreciates the extent and weight of modern "public welfare" statutory offences, and the social implications of criminal liability without fault. Yet, the topic has received scant overall attention. Many have been moved to vituperation or justification; few have essayed critical and catholic evaluation.

With careful scholarship, Dr. Edwards analyses the interpretation of such words as "maliciously," "wilfully," "knowingly," "permitting," "suffering," "causing," "allowing," "fraudulently," and their derivatives and combinations as they appear in statutory offences. He submits a categorisation of the degrees of knowledge involved in these offences, discusses vicarious liability for their commission, and finally draws the whole together into a prolegomena for a general theory of liability for statutory offences. The case analysis is close; but the perspective is wide.

As statute after statute builds in or tacks on its penal clauses, it becomes increasingly urgent to develop a comprehensive theory to incorporate these offences into the general body of the traditional criminal law, meeting the new needs without sacrificing the old values. The reactions of the courts to these statutes have been diverse, changing and reconcilable only within broad conceptual generalisations and narrow typologies of statutes. Even individual judges vary their techniques of interpretation as they move from one phase of the problem to another, and the paradoxical situation has developed that the same judges who foster an approach to statutory interpretation in this field tending away from the conclusion that a statutory prohibition is strict or absolute are yet inclined to interpret "maliciously," "wilfully" and "knowingly" as epithets qualifying the prohibited act and not its consequences—here they extend *mens rea,* there they restrict it; and in neither case for compelling or consistent, legal or social reasons. Dr. Edwards' survey of the entire field should help towards some integration of approach.

Dr. Glanville Williams, in his definitive "Criminal Law—The General Part," is the fugleman of the post-war interest in England in the general principles underlying the criminal law. Dr. Edwards' book is a further important manifestation of that interest. Though the work is not narrowly confined to English law; criticism might be based on the suggestion that too little attention is given to other legal systems. Dr. Edwards makes reference in footnotes to Dominion and United

States authority; possibly, however, the important American case of *Morissette* (1951) 342 U.S. 246 and the Australian case of *Thomas* (1937) 59 C.L.R. 279 deserved more than footnote attention. This is a narrow criticism; two other omissions are perhaps of more consequence. Dr. Edwards discusses negligence as an inculpatory state of mind for some statutory offences and urges its extension for some purposes of legislation and statutory interpretation—continental jurisdictions and theorists have built up much authority and a huge literature on this matter which are of close relevance to Dr. Edwards' argument. Likewise, but more importantly, the American Law Institute has supported the preparation of a Model Penal Code. Already several years of diligent analysis of some of the general principles of the criminal law has been devoted to it by leading American judges, practitioners, and scholars. The work is continuing; much remains to be done; but some important ideas have emerged. One of particular relevance to Dr. Edwards' thesis is that crimes should be classified as felonies, misdemeanours and petty misdemeanours and that there should be a further category which is not a "crime," but which is a "violation." For a violation only a fine, forfeiture or civil penalty may be imposed and the conviction "shall not give rise to any disability or legal disadvantage based on conviction of a criminal offence." It is an endeavour to carve out a middle area between criminal and civil procedures for the types of actions so frequently proscribed by regulatory statutes. Though criminal in form it avoids so far as possible the stigma of criminal processes. The acceptance of this idea would bear heavily on the problems of *mens rea* and statutory offences.

But these are minor quibbles which are not intended to minimise the importance and value of Dr. Edwards' work. In the last chapter he introduces a summary of his thesis with words which are fully justified: "Judicial interpretation of statutory offences is a matter which, in the past, has generally been treated solely in relation to the particular offence before the court. . . . The alternative view, which is now put forward, is that there are certain general principles which should be taken into account when construing any statutory offence based on one of the epithets studied in the earlier chapters of this work." The profession is indebted to Dr. Edwards for a comprehensive and helpful study of a difficult subject.

NORVAL MORRIS.

*Forensic Medicine.* A textbook for Students and Practitioners. Tenth edition. By Sir Sydney Smith, C.B.E., LL.D., Emeritus Professor of Forensic Medicine, University of Edinburgh, and F. S. Fiddes, O.B.E., M.D., Senior Lecturer in Forensic Medicine, University of Edinburgh. London: J. & A. Churchill, Ltd. 1955. xi and 623 and (index) 21 pp. (40s. net.)

The volume under review is the tenth edition of a well-established textbook on Forensic Medicine. It is, however, essentially a reprint of the ninth edition; there is no real evidence of revision of material.

It is pointed out in the preface that the Coroners' Rules, 1953, relieve the general practitioner of the purely pathological work which sometimes came his way.

The matter of Fees is taken out of Chapter I, and appears as Appendix IV.

Appendix I deals with the systematic examination of the viscera for poisons, and contains a section dealing with the Detection and Estimation of small quantities of alcohol in blood and urine; this section (a reprint of the ninth edition) should have been revised and brought up to date in the light of the Report of a Special Committee of the British Medical Association, "The Recognition of Intoxication." This would have been of value since this report is frequently referred to in the courts of today.

From the publishers' standpoint this edition is a marked improvement on the ninth edition. The use of better paper has not only improved the printed matter but has substantially improved the illustrations.

J. B. FIRTH.

*The Trial of Jomo Kenyatta.* By Montagu Slater. London: Secker & Warburg. 1955. 252 and (index of incidents) 3 pp. (18s. net.)

This is an extremely good book written in the style of, and with the same thoroughness as, the Notable British Trials Series. Of course, all the evidence here is not set out in the full question and answer form, for the reason that, since the trial lasted five months and occupied the court for over 100 days, that would make the book inordinately long. Thus much of the evidence is summarised, the verbatim question and answer form being used only for the more important evidence; but, if anything, this treatment makes the book more readable.

*The Trial of Jomo Kenyatta* makes fascinating reading. Mr. Slater presents the complicated evidence, which led to the conviction of the accused on charges of leading Mau Mau, with great skill. But, apart from the intrinsic interest of the trial itself, the incidental features of the story provide a vivid picture of life in Kenya up to the winter of 1952–1953. We learn, for example, about local tribal customs, how the Kikuyu were building up their educational system, how the Kenya African Union (KAU) was organised, what sort of a life the ordinary native led at that time; we learn, even, where to buy London Sunday newspapers in Nairobi (the answer is Woolworth's), and much more besides.

One of the best features of this book is its impartiality. We learn from the Introduction that the author's sympathies tend to be on the side of the accused, but there is nothing in the rest of the book to indicate that he has allowed these sympathies to affect his judgment in deciding which passages of the transcript to quote. He has resisted the temptation to add his own comments to the arguments, and has very fairly allowed the reader to make up his own mind. In other words, this is an intelligent, well-written book which, unlike so many "casebooks," makes some allowances for the reader's own intelligence.

However, it would not be right to leave *The Trial of Jomo Kenyatta* without saying that it was written by a layman (surely no lawyer could ever have allowed the word "counsel" to be spelt "council" however careless his proof-reading!) primarily for laymen. It is true that one gets the thrust and parry of cross-examination, speeches and the judgment, but legal arguments are often dismissed with "a legal battle then developed between counsel." Occasionally the gist of the argument is given, but seldom are the authorities cited. Be that as it may, it does not detract from the readability of this very good account of one of the most dramatic and important trials of this century.

HENRY PALMER.

*Against the Law.* By Peter Wildeblood. London: Weidenfeld & Nicolson. 1955. 189 pp. (16s. net.)

The author, a journalist, was one of the men sent to prison for homosexual offences in the "Montagu Case." This book is a plea that those who, like the author, are unfortunate enough to be homosexuals should be left in peace provided they do not corrupt youth. The account of his early life does not show how he came to be a homosexual, the pattern it followed and the emotions it aroused are too common to be the main causes. But, whilst the first part of the book is unsatisfying and in parts naïve, the rest is not; the account of his imprisonment is most interesting and well worth reading. The uselessness of imprisonment for this type of offence is only too apparent. But that is not to say that no homosexual should be punished, the corrupter and exhibitionist clearly deserve much less sympathy than those who make an effort to be cured or keep their defect to themselves.

**P. A.**

*Dead Line for Crime.* By Duncan Webb. London: Frederick Muller, Ltd. 1955. 237 pp. (12s. 6d. net.)

This is a case-book by a journalist with a wide knowledge of crime and criminals. Mr. Webb deals with the big mailbag robbery in which £287,000 was taken from a Post Office van in the heart of London; Chesney; organised vice in London (in connection with brothels); the murderer Ronald Harries; smuggling in the Mediterranean; the Towpath Murders; and Christie. This is a fair selection of the recent notorious crimes, and Mr. Webb has written about them in the racy style one would expect from a newspaperman. What is interesting about the book is the new slant Mr. Webb is able to bring to bear on each case, for his perspective is, as it were, from below rather than above. The author's intimate knowledge of criminals and the underworld (in the sense that he has personal contacts there) enables him to see each case from a new angle. We learn, rather to our surprise, that in many cases he has been personally responsible for the discovery of an offence or an offender. Perhaps his best "case" is that about Mediterranean smuggling, for his war-time service in the Navy enabled him to pose successfully as a potential captain of smuggling craft. His adventures in the Mediterranean, in search of aliens using British ships for international smuggling, read like real-life cloak-and-dagger stuff. But perhaps all these are really "yarns" rather than "cases"; for all are in the "sensational disclosure" category.

HENRY PALMER.

*Police Procedure and Administration.* Sixth edition. By Cecil C. H. Moriarty, C.B.E., LL.D., assisted by Lt.-Col. W. J. Williams, O.B.E., B.SC., LL.B. London: Butterworth & Co. (Publishers), Ltd. 1955. xvi and 326 and (appendices, tables and index) 42 pp. (10s. 6d. net.)

Cecil C. H. Moriarty, former Chief Constable of Birmingham, is better known, perhaps, as the author of *Police Law*, a work which in recent years has become almost the standard textbook for police training in this country.

The modern police student requires, however, a somewhat broader picture of his job than a mere knowledge of legal requirements and powers of arrest. To be successful he must gain complete cognisance of the purpose of his work and a full appreciation of the complex administrative machine which controls the Service. In this respect, Moriarty's *Police Procedure and Administration* can be of great value.

No critic of Mr. Moriarty's book could say that it is not comprehensive. In fact within its pages—increased in this edition—there is condensed a wealth of knowledge from every source. The book progresses from a brief history of the police (Chapter I) to the findings of the Desborough and Oaksey Committees. It then covers such practical aspects of police duty as beat patrol, crime detection and the compilation of reports.

One chapter is devoted entirely to the Police Pension Act, 1948, and its Regulations. This is worthy of special comment. Anyone who has tried delving into the complicated legislation upon police pensions will be pleased to find the whole subject neatly set out by Mr. Moriarty under relative subheadings with appropriate references clearly stated.

This is certainly a book for prospective police recruits, police students and others who are interested in the administrative side of police work.

CHARLES E. DYER.

## Books Received:

*Evidence and Procedure in Magistrates' Courts.* Second edition. By William Shaw, M.A. London: Butterworth & Co. (Publishers), Ltd. 1955. xi and 106 and (index) 9 pp. (10s. 6d. net.)

*Boss of Britain's Underworld.* By Billy Hill. London: The Naldrett Press, Ltd. 1955. 223 and (glossary of underworld terms) 8 pp. (18s. net.)

*Nick of the River.* The story of Detective Inspector Nixon, late of the Thames Division, Metropolitan Police. By Anthony Richardson. London: George G. Harrap & Co., Ltd. 1955. 256 pp. (15s. net.)

*A Guide to Juvenile Court Law.* Fourth edition. By Gilbert H. F. Mumford, Solicitor, Clerk to the Justices, Luton Borough. London: Jordan & Sons, Ltd. 1955. xxiii and 181 and (appendix) 9 and (index) 10 pp. (12s. 6d. net.)

*Law and the Engineer.* The law of contract and negligence as affecting engineers. By Christopher F. Mayson, A.M.I.E.E., Barrister-at-Law. London: Chapman & Hall Ltd. 1955. xx and 388 and (appendices, bibliography and index) 82 pp. (63s. net.)

**Reader's Digest:**

*Stealing the contents of gas and electricity meters*: In *Martin* v. *Marsh* [1955] Crim.L.R. 781, the accused was held to have committed larceny when he removed shillings from an electricity meter in his home. This case is used as a peg for a consideration of the law on this subject: 119 J.P.J. 843. See also p. 74, above.

*Divided Premises as Brothels*: R. B. shortly reviews the decision in *Strath* v. *Foxon* [1955] Crim.L.R. 773, considering the authorities on which it was based: 99 S.J. 920.

*Imputation on Character of Prosecutor*: The decision in *R.* v. *Clark* [1955] Crim.L.R. 567, is criticised by Mr. Eric Stockdale: 105 L.J. 821.

*Legal Aid in Magisterial and Criminal Proceedings*: The provisions governing the grant of legal aid to prosecutors and accused are detailed by G. S. W.: 99 S.J. 853.

*Glass in Crime Prevention*: The many uses of toughened glass in shops, hotels and public buildings are considered in this article, which also gives examples of the strength of glass and the treatment it will withstand: *Police Review*, December 9, 1955, p. 868.

*Crime on Britain's Waterfront*: The type of article stolen and methods of pilfering at the docks are considered in an article by Mr. Charles Breaks: 119 J.P.J. 844.

*An Investigation of Cases of Arsenical Poisoning*: This is a paper which deals with the examination of the results obtained in cases of arsenical poisoning during the period 1948 to 1952. It extends and amplifies an article published in 1940 in the *South African Medical Journal*: *Journal of Forensic Medicine*, Vol. 2, p. 196.

*The Journal of Criminal Law, Criminology and Police Science*: In the September–October, 1955, issue of this American journal, the titles of the articles of interest are self-explanatory, they are *The Deterrence Concept in Criminology and Law*, p. 347, *Dogs in War, Police Work and on Patrol*, p. 385, *The Document Examiner Aids the Arson Investigation*, p. 404, and *A Critical Analysis of the Theory, Method, and Limitations of the "Lie Detector,"* p. 414.

# THE
# CRIMINAL LAW
# REVIEW

*Editors*
JOHN BURKE and PETER ALLSOP, M.A.
*Barristers-at-Law*

## *Editorial*

### Capital punishment

On February 16 the House of Commons voting on an amendment to a Government motion to amend the law as to murder decided by 293 votes to 262 that the death penalty should be abolished or suspended. The Government accepted this vote and promised to make a statement on the results which would follow from it.

### Practical points

Many readers have sought our opinion on practical problems of general interest and in the April issue of the Review we shall start a feature in which the answers to such questions will be given. Readers' problems will be welcome; each will be answered by an expert and those of sufficient interest published.

### Summary trial of minor offences

Where a defendant who fails to appear before a magistrates' court is found guilty it is usual for the magistrates to insist that his previous convictions be either formally proved or ignored. This is to prevent possible injustice to the absent defendant, but it has led to injustice, particularly in cases of minor traffic offences, for the defendant who appears. He will have all his previous convictions considered and may so make himself liable to a heavier penalty. In a recent case Sir Leonard Costello, chairman of the

Wonford magistrates, drew attention once more to this problem and said: "It is to be hoped that those in authority who are dealing with this matter will before very long do something to remedy this utterly absurd state of affairs." Unfortunately his wish is unlikely to be granted. Among the less publicised recommendations of the Departmental Committee on the summary trial of minor offences was one to change the law concerning the proof of previous convictions (see [1955] Crim.L.R. 543). The Government has been repeatedly reminded of the urgent necessity of giving effect to the Committee's recommendations, but the Home Secretary recently said that there is no hope of finding time for legislation in the near future.[1]

### One law for the rich

Mr. Paul Bennett, V.C., recently refused to grant a certificate under the Costs in Criminal Cases Act, 1952, applied for by a solicitor prosecuting in an alleged shoplifting case on behalf of two West End stores. The magistrate said: "When this legislation became law, whereby a prosecutor could ask for costs, of course Parliament had in mind a person of poor financial resources. It didn't have in mind a rich company, and that the taxpayer should pay that company's legal costs. When you can satisfy me that the taxpayer, who some people think is quite heavily taxed, ought to pay the legal costs of these companies, which issue excellent balance-sheets, then I shall give it."

While there might seem to be a certain justice in these remarks, the Act does not justify them; it nowhere differentiates between the rich and the poor prosecutor. Moreover, the stores were fulfilling a public duty in prosecuting and aiding the hard-pressed police. If they had left the whole matter to the police, they would have had to bear no part of the cost.

### Defences to charges of drunkenness

On charges of being drunk in charge of a vehicle or driving under the influence of drink the defence is sometimes put forward that the accused's condition was caused by exhaust gases in the vehicle, and not by drink. Replying to a question after a lecture at the Royal Society of Arts recently, Mr. L. C. Nickolls, Director of the Metropolitan Police Laboratory said that it was possible to test this defence. Carbon monoxide does not interfere with an alcohol determination and an examination of urine would tell one at once whether alcohol was present or not.

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[1] H.C. Debates, Vol. 548, col. *46*; January 26, 1956.

Recently on a charge of being drunk in charge of a car which had been involved in a crash the defence was put forward that the accused was suffering from concussion and was not drunk. Three doctors said that it would be very difficult for the police surgeon who examined the accused to tell mild concussion from apparent drunkenness. If mild concussion and intoxication were present at the same time it would be very difficult to apportion the symptoms.

### Court precincts

A press photographer took pictures of a witness who had given evidence at Bow Street magistrates' court as that witness was walking along Broad Court. The photographer was summoned for taking and attempting to take photographs within the precincts of the court. Dismissing the summons without hearing evidence, Sir Laurence Dunne said he was not called upon to define " precincts." The photographs, it would appear, were taken on the public highway, a highway which was dedicated to the public and over which that court had no control.

The photographer was awarded thirty guineas costs against the police.[2]

### Public place

A man was found trying to start one of a number of cars displayed on a car dealer's forecourt and was charged under section 15 of the Road Traffic Act, 1930, with attempting to drive a car " on a car park " while under the influence of drink. Before the magistrates his counsel submitted that there was no case to answer as the forecourt was private property and not a public place within the meaning of the Road Traffic Act. The magistrates overruled the submission and the defendant elected to go for trial by jury. At quarter sessions evidence was given that the car dealer's forecourt was immediately adjoining the footpath and was not fenced off from it. The car dealer said that his premises were open from 9 a.m. to 9 p.m. daily for people to look at the cars. In answer to a question he replied " I do object to people coming on this land if demonstrators are not there and I have told them so." As the incident in question took place after the car dealer's normal hours of business and at a time when there were no demonstrators there, counsel for the prosecution considered that he could not ask for the forecourt to be held a public place within the meaning of the Road Traffic Act and he offered no further evidence on that count. The jury, on the direction of the Recorder, therefore returned a verdict of not guilty.

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[2] *The Times*, January 27, 1956.

This case raises an interesting point. It would seem that during business hours the car dealer's forecourt would be a " public place " within the meaning of section 15. In *Elkins* v. *Cartlidge* [1947] 1 All E.R. 829 Lord Goddard C.J. held that: " ' Road ' means ' any highway and any other road to which the public has access,' and so includes every road over which the public passes. Having regard to the definition of ' road,' ' public place ' for the purposes of this section must be read as meaning a place to which the public have access, *i.e.*, have access in fact." Speaking of *R.* v. *Collinson* (1931) 23 Cr.App.R. 49, in which a private field where races were being held was held to be a public place, Lord Goddard said: " The public had not a legal right which they could enforce of access to the field, but it was a public place for the purposes of this section because at the relevant time the public were being invited to use it."

### School attendance

On January 19 the Divisional Court in the case of *Angel* v. *Brownley* reaffirmed that the illness of a parent is no defence to a charge under section 39 (1) of the Education Act, 1944, of failing to cause a child to attend school regularly. Section 39 (2) provides that it shall be a defence if the child was prevented from attending " by reason of sickness or any unavoidable cause . . . ", but it was held in *Jenkins* v. *Howells* [1949] 2 K.B. 218 that " ' sickness ' in that paragraph must mean the sickness of the child. An ' unavoidable cause ' must be an unavoidable cause which actually affects the child. . . . Parliament has not seen fit to provide that what may be called ' family responsibilities ' or ' duties ' can be relied on as an excuse for a child not attending school."

### Prosecutions by the police

We have received a letter concerning prosecutions by the police which we publish at p. 213. Dr. Glanville Williams, who did not cover this matter in his articles on " The Power to Prosecute," has written a short article about it which we publish at p. 169.

### After-care of prisoners

The Council of the Central After-Care Association have published their annual report for 1954 (1s.). Progress has been made in the pre-discharge work of the Association, which is felt to be fundamental to the success of all their efforts. One of their greatest difficulties is to find suitable accommodation for prisoners and Borstal inmates with no homes to go to on release. The number of persons required under section 29 of the Prison Act, 1952, to inform the Association, as the appointed society, of their address on discharge from prison and at intervals during the next twelve months increased to 3,076 in 1954. The Association is concerned at the time spent on this work.

### Animals

We have received from the Universities Federation for Animal Welfare a useful pamphlet setting out the statutory provisions for the protection of animals. Within its scope the pamphlet is thorough and reference is made easy by a good index.

### U. N. Congress on crime prevention

The final report of the United Nations Congress on the Prevention of Crime and Treatment of Offenders held at Geneva from August 22 to September 3, 1955, will not be available for some months. Meanwhile the decisions of the Congress have been published separately.

### Parliament

#### *Miscarriage of justice*

The Home Secretary made a detailed statement concerning the release of Emery, Thompson and Powers from prison (see [1956] Crim.L.R. 75), in which he praised the police work which had established their innocence. He was questioned about the amount of compensation, which members thought inadequate, and about the use or misuse of the term " free pardon." Major Lloyd-George replied that, having regard to all the circumstances, he regarded the compensation as generous and explained that the pardon was of the conviction ; pardon in this sense did not mean forgiveness, but the remission of the penal consequences of a conviction. The Home Secretary did not consider that there were such exceptional circumstances as to warrant his making available a copy of the transcript of the evidence and summing-up in the case either in the library of the House of Commons or to individual members (H.C. Debates, Vol. 548, cols. 31, 47 ; January 24, 26, 1956).

The Home Secretary rejected a suggestion that he should appoint a Select Committee to inquire into all cases of alleged miscarriage of justice which have arisen during the past ten years. He does not see any necessity for such an inquiry and in any event does not think that a Select Committee would be the proper body to conduct it (Vol. 548, col. *12* ; January 24, 1956).

### *Convictions of Metropolitan Police officers*

During the five years between January 1, 1951, and January 21, 1956, 140 members of the Metropolitan Police were prosecuted for offences and 87 were convicted. Of the convictions 38 were of motoring offences and 8 of minor offences. There were 2 convictions of corruption, 1 of conspiring with others to pervert the due course of justice and 2 of perjury (Vol. 548, col. *49* ; January 26, 1956).

### *Abortion*

The Home Secretary has noted the resolution passed by the Magistrates' Association at the annual general meeting on October 21, 1955, calling for a reform of the law relating to abortion (see [1955] Crim.L.R. 766). There is no hope of legislation on this controversial subject (Vol. 548, col. *47* ; January 26, 1956).

### *Heroin*

The Government have been advised that it is not possible under the present law to prohibit the manufacture of heroin, but they have decided that such manufacture shall be restricted to the quantities actually required for home medical consumption and scientific use. As from January 1, 1956, exports of this drug to countries outside the British Islands, except for such small amounts as may be necessary for scientific purposes, and all imports have been prohibited. The Government are satisfied that this action will help considerably in solving the world problem of misuse of the drug (Vol. 548, cols. 369, *46* ; January 26, 1956).

*Subscribers and others are invited to submit for publication articles and letters on matters of interest within the scope of this Review. They should be sent to the* EDITOR, *Criminal Law Review*, 3 CHANCERY LANE, LONDON, W.C.2. *Every effort will be made to return drafts or unsuitable copy, but no guarantee can be given in this respect.*

*Books for review should be sent to the Publishers at the above address.*

# Criminal Law Reform in Northern Ireland

By J. Ll. J. Edwards

*Reader in Law in The Queen's University of Belfast*

To those convinced of the necessity for legislative action to rid the criminal law of many of its weaknesses and anomalies, there is little need to speak of what successive Governments have apologetically advanced as the real obstacle to such progressive reforms, namely, the pressure upon parliamentary time. Much has certainly been done in recent times to reform and tidy up the administration of the criminal law, as may be seen from the Magistrates' Courts Act, 1952, the Justices of the Peace Act, 1949, the Juries Act, 1949, and the Criminal Justice Acts, 1925 and 1948. However, with the exception of intermittent statutes dealing with such topics as road traffic, food and drugs and the licensing laws, the last major legislative incursion into the field of substantive criminal law was before the nineteen-twenties with the enactment of such statutes as the Perjury Act, 1911, the Forgery Act, 1913 and the Larceny Act, 1916. This should serve to bring home the full realisation of how impotent have been the efforts of those—whether judges, practising or academic lawyers—who have pleaded the case for curing our criminal jurisprudence of its existing sores. In Northern Ireland, on the other hand, the so-called pressure on Parliamentary time is noticeably absent, so it may be of some interest to outline some of the reforms which have been effected in recent years in this integral part of the United Kingdom. It should, perhaps, be made clear at the outset that there has been no systematic effort at criminal law reform, and there does not exist in Northern Ireland any parallel to the English Law Reform Committee set up by the Lord Chancellor in 1952. Not that the existence of such a body has done much for the criminal law, it being an all too little known fact that neither the present Committee nor its predecessor, the Law Revision Committee, has ever once been asked to consider any aspect of the substantive criminal law.

## Restriction on Press Reports of Judicial Proceedings

*Preliminary hearings in magistrates' courts*

Among the changes introduced into Northern Ireland law in recent years, no single reform has aroused such widespread controversy as the restrictions imposed on newspaper reports of preliminary hearings by the Summary Jurisdiction Act (N.I.), 1953, s. 42. To achieve this object the relevant section makes two provisions, one absolute and the other discretionary. In the first place, no publication is permitted of any opening statement made by the prosecution. In addition, discretionary power is given to the examining magistrate to make an order prohibiting the publication of any evidence in either of the following circumstances—(1) where the admissibility of such evidence is objected to by the accused and the magistrate is satisfied that such objection is made in good faith; (2) whether or not any such objection is made, where the magistrate is of the opinion that the publication of such evidence would prejudice the trial of the accused. Violation of such an order is made a summary offence punishable with a maximum of six months' imprisonment and/or £500 fine, but no prosecution may be brought except by leave of the Attorney-General for Northern Ireland.

Before turning to consider the merits of this controversial measure of reform, the exact scope of which has sometimes been misunderstood in this country, comparison may usefully be made with the situation which exists in Scotland and in the Republic of Ireland. Recent articles in this *Review* (see [1954] Crim.L.R. 506 and [1956] Crim.L.R. 110) have reminded English lawyers that Scottish criminal procedure knows no public pre-trial investigation. No suggestion has been made that the press is thereby enchained or that the accused is prejudiced, for a list of the prosecution's witnesses and proposed exhibits is always provided and, if the defence has met with unusual difficulty in preparing its case or if it is a case of murder, it is also the practice for copies of the precognitions of Crown witnesses to be given to the accused. In contrast, under the Republic of Ireland's Criminal Justice Act, 1951, s. 20 (1), a judge of the District Court, when conducting a preliminary hearing, may, "if satisfied that it is expedient for the purpose of ensuring that the accused will not be prejudiced in his trial," adopt one or more of the following courses: (1) exclude the public, but not bona fide press representatives, from the court during the hearing; (2) prohibit the publication of information in relation to the proceedings; (3) impose restrictions on publication.

Reverting to the Summary Jurisdiction Act (N.I.), 1953, s. 42, it is important to realise that it imposes no restrictions at all on the attendance of members of the general public at the preliminary hearing. By generally sitting in the same court-room as that where summary jurisdiction is normally exercised the belief has grown, and is now widely held, that examining magistrates when conducting a preliminary hearing constitute a court of law in which the press and the general public have a right to attend. In fact, no such right exists either in England and Wales or in Northern Ireland. For under the Indictable Offences Act, 1848, s. 19—the corresponding provision in Northern Ireland is the Petty Sessions Act (Ireland), 1851, s. 9 (2)—it is laid down that the room or building used for preliminary proceedings " shall not be deemed an open court for that purpose." The respective statutes continue that it shall be lawful for such justices, in their discretion, to order that no person shall have access to or remain in such room or building without the permission of such justices, if it appears to them that the ends of justice will be best answered by so doing. This provision in the English statute of 1848, though now repealed, is repeated in a truncated form in the Magistrates' Courts Act, 1952, s. 4 (2), which simply states that " examining justices shall not be obliged to sit in open court." It would be interesting to learn of any cases in England or Wales in which this discretionary power has been exercised. Generally thought to have been forgotten by magistrates, the Petty Sessions Act (Ireland), 1851, s. 9 (2), has been invoked successfully in Northern Ireland in two recent cases of murder, *R.* v. *Gordon* (1953) and *R.* v. *Dodds* (1955). It should, perhaps, be pointed out that the less restrictive provision of the Northern Ireland Act of 1953 had not become law when the preliminary hearing in the case of *R.* v. *Gordon* was being conducted, and the proceedings in camera were confined to those parts of the evidence—involving an alleged admission and a full confession by the accused—the admissibility of which was contested by the defence. However, in the later case of *R.* v. *Dodds*, both the press and the general public were excluded during the whole of the preliminary hearing and, judging by the evidence given at the subsequent trial, it is difficult to see the justification for the learned Resident Magistrate's decision to apply the 1851 Act and hold the entire proceedings in camera.

Viewed then in the light of the existing law it will be seen that section 42 of the Summary Jurisdiction Act (N.I.), 1953, has only a limited object in view, but that has not prevented it from becoming the focal point in a controversy which has spread beyond the boundaries of Northern Ireland. What then, briefly, are the arguments for and against this new law? The case against the reform is generally said to rest on its interference with the freedom of the press. It is argued, quite justifiably, that under the present law the public at large is denied information which is freely available to those persons present in court during the preliminary hearing, and who are free to disseminate it without any restrictions. The likelihood of garbled versions circulating as to what transpired in the magistrates' court, added to which the wildest rumours are likely to abound, may be said to form a far more potent source of prejudice to justice than a factual, unvarnished account in the press. Another basis for opposing the introduction of a similar measure into English law is the claim sometimes made that vital witnesses have come forward in support of the defence after reading in the newspapers an account of the preliminary proceedings.

The case in favour of reform, on the other hand, rests on the principle that nothing must be allowed to prejudice the accused's right to a fair, unbiased trial which, it is claimed, is denied to the accused under the procedure at present operative in England and Wales. Whereas the defendant has every right at the preliminary hearing to contest the case made out against him and, if necessary, to call witnesses on his own behalf, the general pattern of such proceedings is for the evidence for the prosecution only to be disclosed. In allowing the publication in full of this evidence, it is maintained, it is difficult to offset the prejudice created in the minds of members of the jury who happen to have read the newspaper report and thus acquired a one-sided version of the case. And in this respect it is difficult to see the justification for distinguishing conditions in Northern Ireland from those prevailing in the rest of the United Kingdom. With our innumerable local and provincial newspapers, not to mention the national press, it is reasonably certain that the general public, in any part of the country, is kept fully acquainted with proceedings in the local magistrates' courts. What effect the warnings of judge and counsel at the trial have, on dispelling initial impressions formed by those members of the jury who have read the reports of the preliminary hearing, it is difficult, if not impossible, to say. Until sanction is given to the carrying out of an impartial, objective study of this problem, opinions will continue to be based on the flimsiest of evidence, and this encourages the wide divergence of views which have been expressed in this country on the subject of pre-trial publicity. There are those, like Lord Porter ( (1951) *Journal of the Society of Public Teachers of Law*, p. 463), and Sir C. K. Allen (*The Daily Mail*, February 2, 1954), and Dr. Glanville Williams (*The Proof of Guilt*, p. 229), who are in favour of effecting a change in English criminal procedure, whilst others like Lord Justice Denning (*The Road to Justice*, pp. 66–67), Sir Travers Humphreys (*The Daily Mail*, February 3, 1954), the General Council of the Bar (*Annual Statement* (1953) p. 15), and the Magistrates Association (*The Times*, Oct. 17, 1953) are opposed to any alteration of the existing law. As the present writer has suggested elsewhere (16 M.L.R. 485), basically the whole problem involves a conflict of principle. On the one hand, there is the danger that by preventing a full report of the proceedings the impression may circulate that part of a criminal case can be conveniently suppressed—on the other hand, there is the danger of an unfair trial caused by the prejudice resulting from the publicity given to the prosecution's case before the actual trial. Faced with such a conflict the question is, which of these considerations should prevail? To my mind the paramount motive must be to ensure a trial wherein the accused's guilt or innocence is determined by a jury entirely free from any preconceived notions concerning the case, and, as a means towards achieving this end, it is submitted that the Northern Ireland statute represents a signal advance on English law.

### *Proceedings in juvenile and matrimonial courts*

Statutory restrictions on the publishing of reports of judicial proceedings are, of course, not unknown in English law. Thus, under the Children and Young Persons Act, 1933, s. 49 (1), newspapers are not allowed to reveal any particulars relating to the defendant or any witness who appears before a Juvenile Court. Moreover, only rarely is the power exercised to dispense with such restrictions, and this is compendiously described as depending upon " the interests of justice." Again, only certain innocuous particulars of separation and maintenance proceedings may be published, as laid down in the Summary Procedure (Domestic Proceedings) Act, 1937, s. 3 (now re-enacted in the Magistrates' Courts Act, 1952, s. 58). In these two respects Northern Ireland has identical provisions, but a visitor to the Province will be surprised to find full reports of divorce and nullity proceedings in the High Court being published in the press. The reason for this is the absence of any measure corresponding to the Judicial Proceedings (Regulation of Reports) Act, 1926. With the Northern Ireland newspapers generally showing a high standard of propriety in what is published in these cases, the failure to follow the English law in this sphere has not been particularly noticeable.

### Summary Offences

Whether an attempt to commit a summary offence is itself always a crime is still problematical. Occasionally, the legislature makes express provision to cover such contingencies, as, for example, in the Malicious Damage Act, 1861, s. 38, the Road Traffic Act, 1930, s. 15, and, in Northern Ireland, the Civil Authorities (Special Powers) Act (N.I.), 1922, s. 2; no difficulty is experienced in determining which courts have jurisdiction to try such cases. Furthermore, it seems reasonably clear that where an indictable offence is triable summarily, an attempt to commit the same crime can also be tried in the magistrates' court. But there exists the apparent anomaly that an attempt to commit a summary offence is not triable by the same court as that which has jurisdiction to hear and determine the substantive crime. This means that a person charged with attempting to commit any one of the many summary offences under the Larceny Act, 1861, or the Malicious Damage Act, 1861, must, under the existing law, be sent for trial. This position no longer exists in Northern Ireland, the opportunity having being taken to include in the Summary Jurisdiction Act (N.I.), 1953, s. 23, a provision to the effect that " any person who attempts to commit, or incites, or attempts to procure another person to commit, any offence punishable on summary conviction shall be liable to be prosecuted, tried, convicted and punished as if he had committed that offence."

Another venture into resolving a situation in English law which has for a long time hampered what would seem to be legitimate claims has recently been effected by the same Northern Ireland statute. As is well known, the victim of a common assault or battery is placed in the invidious position of having to choose between instituting criminal or civil proceedings against his assailant. For, under the Offences against the Person Act, 1861, s. 45, once the person accused has either been acquitted or has discharged the penalty imposed upon him on conviction, no further civil proceedings may be brought against him. This situation no longer exists in Northern Ireland, the above provision in the 1861 Act having ceased to apply since the Summary Jurisdiction Act (N.I.), 1953, s. 46, ordained that a conviction or acquittal for common assault was no bar to any civil proceedings which might be brought against the defendant. It should be added that the position in regard to aggravated assaults remains the same as under English law, for which see the Offences against the Person Act, 1861, s. 46.

If it be thought that this alteration in the law is rather hard on the defendant, what is to be said for the perpetuation of the peculiar position which arose when the provisions of the Summary Jurisdiction Act, 1879, were not extended to Ireland? So far as Northern Ireland is concerned, the important lasting effect of that step was to deny persons accused of summary offences punishable with more than three months' imprisonment of the right to be tried by a jury. So far as is known, only two exceptions at present exist—under the Conspiracy and Protection of Property Act, 1875, s. 9, and the Merchandise Marks Act, 1887, s. 2 (6)—and it is highly probable that in both instances there was no awareness of the fact that anomalies were being created. Considering the vast number of cases in which indictable offences are nowadays tried summarily, it is unlikely that in practice any great hardship is incurred by this strange anomaly, and yet the absence in Northern Ireland law of a right which is regarded as fundamental in English criminal procedure is juristically indefensible.

Another striking departure from English law involves the familiar notice "Trespassers will be prosecuted." With however much contempt such signs may be treated by knowledgeable lawyers or law students in this country, in Northern Ireland such signs possess more than the proverbial grain of truth. As long ago as the Summary Jurisdiction Act (Ireland), 1851, s. 8, trespassing in any field, garden, pleasure ground, wood, plantation or other place was made an offence "if accompanied by a refusal to leave when called upon to do so by the owner or some person on his behalf." Examples of this proposition, that trespassing may amount to a crime, are, of course, to be found in many English local and private Acts, but in Northern Ireland the doctrine has been given an additional fillip in the Summary Jurisdiction (Miscellaneous Provisions) Act (N.I.), 1946, s. 1. This enactment makes it an offence to enter any building, whether normally used for residential purposes or not and whether in the course of construction or not, "with intent wrongfully to take possession or use such premises." However, the section goes on to provide that no offence is committed if the accused proves that he acted "under a bona fide and reasonable belief that he was lawfully entitled to enter or use the premises." The offence, which is triable summarily, carries a maximum penalty of three months' imprisonment and/or £25 fine.

### The Larceny Act, 1916

Few will question the opinion that the English law upon the subject of theft and cognate offences is in dire need of reform and, although nothing in the nature of a full scale revision of the Larceny Act, 1916, has been attempted by the Northern

Ireland legislature, two isolated reforms are deserving of notice. The first of these deals with the crime of obtaining by false pretences, which, according to the Larceny Act, 1916, s. 32, is restricted to the obtaining, with intent to defraud, of " any chattel, money or valuable security." These words have been consistently regarded by the courts as not including things which were not the subject of larceny at common law. Thus, in *R.* v. *Robinson* (1859) Bell C.C. 34, a conviction for obtaining two pointers by false pretences was quashed on the ground that domestic animals, such as dogs and cats, were never protected by the common law. This omission was rectified by the Larceny Act, 1861, s. 18 of which, for example, makes it a summary offence to steal a dog; this becomes an indictable misdemeanour when a person is charged again after a previous conviction for the same offence. Neither of these provisions, however, alters the position in relation to the crime of obtaining by false pretences, which, in addition to excluding domestic animals from its purview, also excepts the fraudulent obtaining of real property or of anything savouring of the realty. So far as Northern Ireland is concerned, however, these defects are now remedied by the Criminal Justice Act, (N.I.), 1953, s. 17, which re-defines the offence of obtaining by false pretences, substituting the words " any property or valuable thing " in place of the existing formula in the Larceny Act, 1916, s. 32.

Another statutory crime with apparent limitations arising out of the form of words used to define it is that of demanding with menaces or by force " anything capable of being stolen with intent to steal the same," contrary to the Larceny Act, 1916, s. 30. In addition to raising doubts as to whether the words " anything capable of being stolen " include not only things capable of being stolen under the Larceny Act, 1916, s. 1 (a limitation suggested by the decision in *R.* v. *Bernhard* [1938] 2 K.B. 264, but compare the view expressed in [1954] Crim.L.R. 84), but also things made larcenable under other special statutory provisions, there seems to be no crime committed where a blackmailer contents himself with demanding a " loan " from his prospective victim. Yet another difficulty arises in consequence of the Court of Criminal Appeal's ruling in *R.* v. *Moran* (1952) 36 Cr.App.R. 10, that there is no such crime as an attempt to demand with menaces. According to Lord Goddard C.J.: " A man may form the intention of demanding money with menaces and then not put his intention into practice. In that case he would not be guilty of demanding. But the court cannot see how a person can be guilty of an attempt to demand: there is either a demand or there is not." The present writer has endeavoured elsewhere (15 M.L.R. 345) to show the fallacy of this reasoning, which may be exemplified by a single illustration. A blackmailer posts a letter to his proposed victim demanding money with menaces, but the letter never reaches the addressee. Surely, on the principle accepted in *R.* v. *Ransford* (1874) 13 Cox C.C. 9, there is a sufficient attempt to demand with menaces. To overcome the limitations discussed above, the Criminal Justice Act (N.I.), 1953, s. 18, enacts a new offence which is defined thus: "Every person who without a claim of right made in good faith demands or attempts to demand of any person with menaces or by force any property or valuable thing shall be guilty of felony."

### Road Traffic Offences

Unauthorised taking and driving away another person's motor vehicle was made a statutory offence under the Road Traffic Act, 1930, s. 28, and a similar offence exists under Northern Ireland law. Underlying the creation of this new crime, of course, was the fact that motor-cars are frequently taken unlawfully but with no intent to deprive the owner permanently, which is a necessary ingredient in the crime of larceny. Northern Ireland has gone one stage further than English law in this respect, and in the Criminal Justice Act (N.I.), 1953, s. 15 (repeated in the Road Traffic Act (N.I.), 1955, s. 48) it is made an offence, triable summarily or on indictment, to take and drive away a pedal cycle without the consent of the owner or other lawful authority. As in the case of motor-vehicles, it is a defence when the accused can show that he had a reasonable belief in the existence of lawful authority or that the owner would have given his consent if asked. The enactment of similar legislation in this country, one may surmise, would create a feeling of utter dismay in certain University towns.

Another original note is struck in the same Road Traffic Act (N.I.), 1955, s. 6 of which makes it an offence, punishable on summary conviction (some may think inadequately) by a maximum fine of £50, for any person to sell or offer to sell a motor-vehicle in an unroadworthy condition. To this charge the accused may put forward the defence that he had reasonable cause to believe either that the vehicle would not be used until it had been made roadworthy or that it would not be used on a road in Northern Ireland. Unless the vehicle is intended to be sold as scrap, this latter defence seems purposeless as it is almost inconceivable that any vehicle intended to be used in, say, England or Scotland or Eire, would not, at some stage in the course of transit, travel along the Northern Ireland roads. A similar offence is included in the English Road Traffic Bill, clause 1 (4) of which bases liability not upon the criterion of " unroadworthy condition " but on the absence of a recently issued certificate by one of the stations to be set up for testing the condition of motor-vehicles. No provision for such stations is contemplated in Northern Ireland.

Turning to the existing law common to England and Northern Ireland, it is well recognised that one of the major difficulties in the enforcement of road traffic standards is the unwillingness of juries to convict of motor-manslaughter, and the equal readiness to convict of the less heinous offence of reckless or dangerous driving (Road Traffic Act, 1930, s. 11) with its maximum penalty on indictment of two years' imprisonment. An additional drawback is the confusion which exists as to the precise nature of *mens rea* in such cases of manslaughter, due to the ambiguous manner in which the doctrine of criminal negligence is applied by the courts—see *Andrews* v. *D.P.P.* [1937] A.C. 576. Faced with this combination of difficulties it is worth noting that the newly enacted Road Traffic Act (N.I.), 1955, s. 38, increases the maximum term of imprisonment for dangerous driving to three years, and creates a new indictable offence which may be described as occupying an intermediate position between manslaughter and dangerous driving. This new crime consists of driving dangerously and thereby causing the death of, or grievous bodily injury to, another person—the maximum sentence in such cases is to be five years' imprisonment. Provision is also made for alternative verdicts. Thus, a person charged with manslaughter may be convicted of the new offence but, it will be noted, this carries a possible longer term of imprisonment than the present maximum penalty for dangerous driving. The jury, moreover, if not satisfied that the accused caused the death or grievous bodily injury to the victim, can find the accused guilty of dangerous driving. An important difference between this new offence and the corresponding offence in the English Road Traffic Bill, clause 7 (1), is that the proposed crime under English law will be restricted to cases of " causing death " whereas, as will be observed, the Northern Ireland offence extends to cases of " causing death or grievous bodily injury." The net result of this distinction is to provide a heavier penalty in cases arising in Northern Ireland where the accused occasions serious injury to another person in the course of driving dangerously. It will be interesting to observe the attitude of judges and juries in Northern Ireland and, presumably, later in the rest of the United Kingdom, towards the respective provisions, which are clearly intended to overcome the present prejudice against returning verdicts of manslaughter in motoring cases.

### Public Mischief

The recognition by the English Court of Criminal Appeal (Lord Hewart C.J., Avory and Branson JJ.) in *R.* v. *Manley* [1933] 1 K.B. 529, of the existence of a common law misdemeanour of public mischief has not gone unchallenged in subsequent years. Assailed by many text-writers, the reasoning underlying the decision in *Manley* has also been severely criticised by a later Court of Criminal Appeal (Lord Goddard C.J., Sellers and Havers JJ.) in *R.* v. *Newland* [1954] Crim.L.R. 51, in which case the Lord Chief Justice maintained that the right approach is to regard public mischief cases as part of the law of criminal conspiracy, and to hold the actions of an individual not committed in combination with others as indictable only if they constitute what has been held in the past to be common-law or statutory offences. The Judicial Committee of the Privy Council in *Joshua* v. *R.* [1955] Crim.L.R. 116, contrived to sidestep this problem, and so speculation continues as to what view the House of Lords is likely to take on the issue of the freedom of the judiciary to create new offences. Should that occasion arise, as well it may following the suggestion made by Lord Goddard C.J. in *Newland*, it is certain that, in addition to the authorities referred to above, considerable weight will be given to the views expressed recently by Lord MacDermott, the Lord Chief Justice of Northern Ireland, when delivering the judgment of the Northern Ireland Court of Criminal Appeal in the unusual case of *R.* v. *Bailey* (1956), as yet unreported.[1]

So far as the so-called crime of public mischief is concerned the facts in *Bailey's* case are indistinguishable from those in *Manley,* both cases involving false statements to the police. The defendant in *Manley*, it will be recalled, had given false information to the police that she had been assaulted and robbed, thereby causing police officers to waste their time investigating a bogus crime, and exposing to suspicion persons answering the description of the pretended robber. In *Bailey*, on the other hand, the defendant made a false confession of having participated with a couple of confederates in killing a man, which killing the police were already investigating. After diverting a large number of officers to the investigation of Bailey's statement, and employing a floating crane and magnet to dredge a river into which the defendant had said he had thrown the lethal weapon, the police subsequently charged the defendant with murder. Very soon after, however, Bailey retracted his "confession" which he declared to be a concoction, and was then charged with effecting a public mischief. He was convicted at the Belfast City Commission in October of last year and sentenced by Sheil J. to twelve months' imprisonment. On appeal to the Northern Ireland Court of Criminal Appeal, it was not disputed that the evidence adduced was ample to substantiate the allegation of public mischief, the sole question for the court being whether the indictment disclosed an offence known to the law.

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[1] I am indebted to John Petrie, *Barrister-at-Law*, one of the reporters for the Northern Ireland Law Reports, for providing me with an advance copy of the court's judgment.

### *Right of the judiciary to create new offences*

In an exhaustive review of the earlier authorities, Lord MacDermott paid particular reference to the Scottish cases, *Kerr* v. *Hill*, 1936 S.C. (J.) 71, and *Gray* v. *Morrison*, 1954 S.C. (J.) 31, in which the Court of Justiciary have held that conduct similar to that in *Manley* constitutes a crime according to the law of Scotland. It is, however, noteworthy that in none of the judgments is any reference made to an independent crime of effecting a public mischief, the accent rather being placed on the offence of knowingly making a false accusation of crime. Referring to the decision of the English Court of Criminal Appeal in *R.* v. *Manley*, Lord MacDermott considered that the real basis for that decision lay in the dictum of Lawrence J. in *R.* v. *Higgins* (1801) 2 East 5, who stated: "All offences of a public nature, that is, all such acts or attempts as tend to the prejudice of the community, are indictable." This principle has been widely criticised before, but it is heartening to note the Northern Ireland judges concurring with Lord Goddard C.J.'s statement in *R* v. *Newland* denying the right of the judiciary to create new criminal offences.[2] In Lord MacDermott's own words: "If the charge preferred against the appellant did not previously constitute an indictable offence this court has no duty and no jurisdiction to make it such." Referring to the general course of development in the criminal law, the Lord Chief Justice said it showed a process of defining categories of criminal responsibility in relation to decided cases, and of stating principles with a close regard for authority. "To hold the dictum of Lawrence J. well founded" he added, "would be to affirm not only a striking departure from that course but a step which we cannot accept as within the province of the judiciary."

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[2] It would appear that one member of the court, Black L.J., had second thoughts on the matter, for in the course of argument he declared: "If conduct prejudicial to the community is not dealt with by the legislature the judges must be entitled to deal with the matter."

### *Functions of judge and jury in public mischief cases*

Having made its position clear on this fundamental issue, the Northern Ireland Court of Criminal Appeal then advanced the view that, if such an offence as public mischief exists in English law, much of the danger inherent in the *Higgins* principle is circumvented by leaving the last word with the jury and not with the judge. Reference was made to the ruling given by the Judicial Committee in *Joshua* v. *R.* according to which the sole province of the judge is to direct the jury as to the elements of the crime of effecting a public mischief, leaving it to the jury to decide on the facts whether the defendant is guilty. It is, however, not insignificant that no court has yet ventured to expound the precise elements of the crime. If all that the above proposal purports to do, whilst equating public mischief with " acts injurious or prejudicial to the public interest," is to make the jury instead of the judge the arbiter of that criterion then certainly the powers of the judges are considerably curbed, but does the proposal diminish the danger of vagueness and uncertainty in the law?

### *Perverting the administration of public justice*

Being unwilling to decide the appeal on the basis of *Manley* or of the dictum of Lawrence J. in *Higgins*, the Northern Ireland court in *Bailey* went on to consider whether, apart altogether from these unsatisfactory authorities, the appellant's conduct in the instant case amounted to an offence known to the common law. Two possibilities were explored, first, common nuisance, and secondly, acts prejudicial to the administration of public justice. While appreciating the great diversity of cases comprehended by common nuisance, the court rejected this possibility. In considering the second alternative, reference was made to common law perjury, embracery, interfering with witnesses, and the publication of matter calculated to prejudice a fair trial, as illustrations of the common law misdemeanour of perverting the administration of public justice. In the opinion of the court in *Bailey* this category is not confined to the processes of adjudication, but also comprehends functions relating to the investigation of offences by the police and the arrest of suspected persons. The conviction of the appellant was, therefore, sustained on this footing, which category of misdemeanour, the court went on to say, included the old common law offence of " raising the hue and cry without cause " (see Hawkins, *Pleas of the Crown*, c. 12, s. 5, and Blackstone, *Commentaries* (1862 ed.), Vol. IV, p. 341).

The statement of offence in the indictment in *Bailey* read "effecting a public mischief" and, although the particulars of offence contained sufficient information to justify the more accurate crime of "attempting to pervert the course of justice," the court was faced with the problem whether the description relied upon in the indictment was fatal to the Crown's case. At common law, a defendant may not be convicted of an offence of an entirely different character from that charged in the indictment, to which rule there are a number of statutory exceptions and also the proviso that, where the crime charged is a more serious felony or misdemeanour than that with which he is convicted, the conviction is allowed to stand provided the indictment contains words apt to include both offences. In *Bailey's* case, it is futile to argue the seriousness of the respective misdemeanours and the Northern Ireland Court of Criminal Appeal upheld the conviction on the ground that the expression "public mischief" did not misdescribe the offence of "attempting to pervert the course of justice," and had not embarrassed the accused in any way. In accepting the soundness of this decision in the particular case before the court, care must be taken lest it be used as justification for introducing a wider principle whereby the accuracy of the facts relied upon in the particulars of offence is considered all important and the correctness of the charge in the statement of offence is regarded as of secondary importance.

### *Statutory provisions*

By recognising the extensive ambit of the misdemeanour of perverting the administration of justice, the Northern Ireland judges achieved a result which, on the facts of the case, seems likely to commend itself to the legal profession and to the community at large. However, the final decision as to whether there exists a crime of public mischief under English law, covering in particular conduct which falls outside the administration of public justice, remains to be answered by the House of Lords. It may be recalled that Lord Goddard C.J. in *R.* v. *Newland* has advocated that conduct similar to that in *Manley* should be made a summary offence. In this connection, it is of interest to note that in some countries possessing a criminal code steps have already been taken to include provisions covering the *Manley* and *Bailey* type of situation. Thus, under section 120 of the new Canadian Criminal Code it is made an offence, punishable with a maximum of five years' imprisonment, for any person "with intent to mislead," to cause a peace officier to enter upon an investigation by (a) making a false statement that accuses some other person of having committed an offence, (b) doing anything that is intended to cause some other person to be suspected of having committed an offence that he has not committed, or to divert suspicion from himself, or (c) reporting that an offence has been committed when it has not been committed. In Ceylon, section 180 of the Penal Code already provides a penalty for giving false information to the police, but an amendment to the New Zealand Criminal Code was introduced under the Police Offences Amendment Act, 1935, s. 4, to cover the *Manley* type of case. Yet, so far as the present writer is aware, no changes have been introduced in those Australian states with criminal codes.

Beyond this situation involving interference with the administration of justice, there remains an uncharted hinterland, and it is likely that it is here that the problem of public mischief as an independent crime will eventually fall to be determined. In one such instance of public mischief the Northern Ireland legislature has taken a somewhat severe line. During the last war, cases where grossly defective air-raid shelters had been erected appear to have formed the basis of many prosecutions for public mischief in both jurisdictions. Henceforth, under the Civil Defence Act (N.I.), 1950, s. 8, any person who executes any works or supplies any equipment for civil defence purposes knowing it to be defective, commits a felony punishable with a maximum of ten years' imprisonment and/or fine of £5,000. If actual knowledge is not established, but the accused is shown to have been negligent, the offence is reduced to a misdemeanour punishable with two years' imprisonment and/or fine of £1,000. Judged by these standards of punishment, it seems unlikely that the Northern Ireland legislature would adopt Lord Goddard's suggestion that public mischief involving the perverting of public justice should constitute a summary offence.

# The Code of Ethiopia

By T. J. Clogger, *Assistant Superintendent, Tanganyika Police*

The Penal Code of Ethiopia was promulgated on August 5, 1941. It contains principles unrecognised in the criminal law of other countries and a knowledge of the Bible aids one in its interpretation.

### *Diminished responsibility*

It is interesting to compare our maxim "Ignorance of the law is no excuse" with section 16 of the Preface to the Code which reads: "Our Lord has said in the Gospel that he who knows much shall be punished much, but he who knows little shall be punished little (St. Luke xii, 47.) This is elaborated in the second chapter:—

12. The man who offends after learning and knowing the law of the Government, and after reading the law or hearing the proclamation with his own ears, is a wilful offender and shall receive full punishment.

13. For a man who is weak and forgetful, who is unable to keep on remembering and observing the law, though he sees with his eyes the law of the Government and hears it with his ears and does not fail to be present at the courts, one tenth of his punishment shall be remitted.

14. The countryman who does not live in town, who has not seen with his own eyes how the work is done and completed but only hears by report the law and ordinance of the Government, shall have two tenths remitted.

15. The monk who lives in a sanctuary, and the hermit, who is far from the law and news of the world, shall have three tenths remitted.

16. The poor man who is unable to attend and hear what goes on in any kind of court and is unable to know the law and ordinances of the Government by reason of his poverty and different mode of living shall have four tenths remitted.

17. The stranger who has come from a foreign country, who has not heard the law and ordinances of the Government (for a period of six months), shall have five tenths remitted.

18. The woman who has not learned the law and ordinances and does not go out to the courts shall have six tenths remitted.

19. The man who is unable to know properly the edicts and law of the Government by reason of his being mentally deficient through illness or any other cause shall have seven tenths remitted.

20. The countryman who converses in the language of his own country and does not know the Amharic language in which the edicts and law of the Government are made shall have eight tenths remitted; this present law, however is only valid for a period of three years beginning from the date of its enactment; after three years the punishment shall be decided according to law.

21. He whose age is from 9 to 12 years shall have nine tenths remitted.

### *Restrictions on execution*

In the fourth chapter there is laid down the law concerning possessions which are not confiscated in punishment:—

25. It is laid down that the tools of a man who has to pay a

fine shall not be confiscated so that the confiscation of his tools may not deprive him of his livelihood.

26. If the sentence of a fine is passed on a man who lives by getting his daily food and clothing by his daily work only, having no other money sufficient for the livelihood of himself and those of his household he shall be punished by imprisonment as is laid down by law; his tools and his daily food and year's clothing shall not be taken away in payment of a fine.

28. From a farmer whose only livelihood is farming a yoke of oxen with their implements and a cow with its calf shall not be taken away in payment of a fine.

29. From a trader whose only livelihood is trade, one pony with its girths, one mule with its saddle and one tent shall not be taken away in payment of a fine.

30. From a soldier who is liable to go on active service or has to live in some other place where he is ordered, one pony with its girths, one mule with its saddle and one tent shall not be taken away.

31. From a priest a book which is the only one of its kind and the property which he uses in church shall not be taken away in payment of a fine.

32. From a writer, writing materials shall not be taken away in payment of a fine."

### *Violence*

When violence is used against a person, the guilty one may be described in any of ten ways: These are (1) *an oppressor*, one who injures another man by taking his wife as was done by Uriah; (2) *a lawless person*, one who injures another man by an unexpected attack in an uninhabited place where there is no judge or assistance; (3) *a proud person*, one who, being proud of his possessions or riches and thinking only of his own honour, plays with a man's life like Herod; (4) *an envious person*, one who injures another man, thinking: "His honour has been increased, his rank has risen, his name is known," and being angry at the lessening of his own honour; (5) *a treacherous person*, one who causes harm to another man either by giving him poison to drink secretly, or after taking money like Judas; (6) *a revengeful person*, one who causes harm to another man either from an inherited desire for revenge, or from having kept in his mind abuse which he has suffered or injury which has been inflicted on his family; (7) *an intemperate person*, one who, rejoicing in the lust of the flesh, causes harm to another man when he is overcome by food and drink; (8) *a quarrelsome person*, one who through lack of patience during a quarrel when he is given some harmless abuse and through want of patience and heat of blood, causes harm to another man; (9) *a careless person,* one who strikes another man with a stick or a stone, with the intention of punishing him, not of killing him, but causes harm to him by striking him where he did not mean to do so; (10) *a bully,* one who causes harm to another man by striking when he is abused, or by taking up weapons of war when a stone is thrown at him; or one who injures another man morning and evening, thinking he is afraid because he is patient when he is injured.

### *Idleness*

Analogous to the Vagrancy Acts is the sixteenth chapter which concerns the crime committed by a man existing as an idler without a master and without work and by a man existing as a beggar without having any infirmity and by publicly saying what is untrue.

" 265. If idleness is proved against an idler who has no work or master or dwelling place or means of subsistence, he shall be arrested and handed over to the official in charge of the hired workmen and shall work in chains from one month to one year. But if he finds a man who will be his guarantor or if he finds work, he shall at once be released. But if no guarantor is found by the time he has been in chains for one month, the official in charge of the hired workmen shall give him only what is needed for food and shall set him free after giving him the money which he has saved up for him as pay for his work and receiving a receipt in the presence of the judge. But if he be arrested a second time, he shall be handed to the official in charge of the hired workmen and shall work under his charge until evidence is given of a change of character and a love of work."

### *Dangerous driving*

Road traffic has not been forgotten and is pithily dealt with in section 477: " People who break the law that is in force for wheeled traffic and automobiles on a public road and cause a collision between wheeled vehicles and automobiles owing to speed shall pay a fine. If owing to this collision a man shall suffer serious injury, they shall pay damages for serious injury; if a man should be killed, they shall pay blood-money. If anything shall be broken, they shall pay damages. But if he killed a man through driving without blowing his horn and without regarding the law which has been issued concerning the drivers of automobiles, after the matter has been examined and proved he shall be sentenced to death, as if he had a long-standing hatred for the dead man or a desire for revenge."

# Advocacy by Police and Justices' Clerks

By GLANVILLE WILLIAMS, LL.D., *Barrister-at-Law*

A prosecutor, being in legal theory not a party to the case (which is theoretically a prosecution by the Crown), has no right of audience in a trial on indictment, except through a barrister or solicitor in the usual way (*Brice* (1819) 2 B. & Ald. 606). In cases before magistrates, however, there are certain exceptional rules.

## *Lay prosecutors in summary cases*

A prosecutor, whoever he may be, has a statutory right to conduct a case tried summarily in a magistrates' court. Before 1952 this was perhaps not absolutely clear; one view was that the prosecutor could only call and examine witnesses, and then perhaps only if he gave evidence himself; the relevant legislation did not in express terms empower him to cross-examine witnesses or to make speeches or to argue points of law (see 72 J.P.J. 87). It was, however, held in *Duncan* v. *Toms* (1887) 56 L.J.M.C. 81, that a policeman had a right as informant to examine witnesses and argue the case. This decision is confirmed by the Magistrates' Courts Rules, r. 17 of which gives the prosecutor an express right not only to produce the evidence but to make the usual speeches, and it is evident that he has a full right to conduct the case. Not all " constable advocates " exercise the full right; they may merely call witnesses and ask them sufficient questions to bring out their story.

The fact that the right is confined to informants (prosecutors) makes the question who is the informant of some importance. By the Summary Jurisdiction Act, 1848, s. 10, an information might be laid by the informant in person or by another person authorised in that behalf. These words are repealed by the Magistrates' Courts Act, 1952, and not repeated in that Act or in the Rules made thereunder. Probably, however, the law is unchanged, so that the informant is the person named as the informant, not the one who actually lays the information. Thus one who lays an information on behalf of another would have no right to conduct the case as prosecutor. But if the purported principal cannot prosecute, or has not authorised the prosecution, the actual informant will be treated as prosecutor ([1955] Crim.L.R. 673). Also, particular statutes confer a right of audience upon some Government officers.

Police advocacy is facilitated by the practice of allowing hearsay information for summonses. The Chief Constable or some other superior officer (frequently designated as Prosecuting Officer in the Warrant Department of the particular Force) lays the information, though the offence was witnessed by another policeman, merely for the purpose of entitling himself to conduct the case in court.

### *Arguments for and against "police advocacy"*

The judges have vacillated in their attitude to police advocacy. In *Webb* v. *Catchlove* (1886) 3 T.L.R. 159 it was frowned upon, and the observations in this case were approved in *Duncan* v. *Toms,* above. In *May* v. *Beeley* [1910] 2 K.B. 722 the court held that police advocacy was not an argument against the validity of a conviction, and there were cases where there might be no objection to the facts being brought before the court by a policeman. But it was said at the same time that if the police advocate acts as a witness, the expressions of judges who disapproved of police advocacy were applicable.

The question was considered by the Roche Committee on Justices' Clerks, who in their Report of 1944 (Cmd. 6507, paras. 60–61) expressed the opinion that the criticism of the practice had been misunderstood. The Committee said: "The objection is to police officers taking the place of professional advocates. If, for instance, a police officer were to conduct a prosecution when he is not the informant he would be appearing on behalf of the informant, and this is not permissible. The technical objection to such a police officer conducting the prosecution may be surmounted if he lays the information, for he will then appear as informant, but other considerations arise if this is done solely to enable a particular officer to conduct the prosecution. When the Summary Jurisdiction Act, 1848, gave an informant the right to conduct the prosecution it was doubtless supposed that informants would normally be persons who had been injured or police officers concerned with the case. We do not think that it was intended that the person to lay an information should be selected because of his skill in presenting cases. There may be no objection to this practice occurring occasionally but if it is normal or usual the result is the growth of a class of unqualified advocates. The criticism of police advocacy is also directed, and we are in agreement with it, against a police officer conducting such prosecutions as require the exercise of the skill and proper art of the professional advocate.

The fact is that, in cases of this sort, the police from motives of economy and sometimes of vanity, are often too slow to employ a solicitor where one is required either by reason of the nature of the case or of the employment of an advocate for the defence."

It will be seen that the Committee approved, or did not disapprove, police advocacy in straightforward cases where the officer was informant and was concerned with the case. However, it must often happen that an officer who is concerned with the case is himself a necessary witness for the prosecution, and then, according to *May* v. *Beeley*, it is not proper for him to act as advocate.

If police advocacy be regarded as in principle a proper practice, it is a little difficult to see why the practice should be confined to the officer who happens to lay the information. There is generally no legal requirement that the person laying the information should have any connection with the crime or its investigation. The exigencies of police service may call away to other duties the officer who has laid the information, and in this event the rule that no other policeman can conduct the case appears in the light of a technicality. The rule is generally ignored by magistrates, and it has been held that the fact that a policeman who is not the informant is allowed to conduct the case does not invalidate a conviction (*May* v. *Beeley*, above).

The practice of police advocacy has from time to time been condemned by practising lawyers in much more forthright terms. One objection to it is that the policeman may be tempted to suppress evidence favourable to the defence, and some lawyers have claimed to be able to cite examples of this from their own experience. When a policeman brings a charge, his reputation is to some extent bound up with getting a conviction, so that there is an unfortunate conflict between his self-interest and his duty of impartiality as a prosecutor. Also, he does not necessarily understand the etiquette of the legal profession in these matters, and so may be led, for example, to " press for a severe penalty " in a way that offends the legal observer. When examining fellow-officers his *esprit de corps* may lead him to attempt to cover up their deficiencies or misconduct. As a comparatively minor example of the way in which the police may err, Havers J. recently commented unfavourably on the fact that the police officer prosecuting for the police on the preliminary examination had allowed his brief or confidential papers to be disclosed to a journalist (*Gardner, The Times,* February 15, 1955).

The particular objection to advocacy by a police constable who is also himself to give evidence is, of course, that he is in possession of the proofs of evidence of the other witnesses, and so may be led, consciously or unconsciously, to mould his own evidence to accord with theirs. Another difficulty is that where witnesses have been ordered out of court, the advocate-witness must necessarily remain, and the fact that he is made an exception to the rule must appear an injustice. The latter point can be met by the constable giving his evidence first, after opening his case. But the objection still remains that he has taken, or has in his possession, the proofs of evidence of the other witnesses. Also, an advocate who gives evidence himself must do so in narrative and not in question-and-answer form, which is a departure from the normal practice of the courts.

To these criticisms it is replied that the cases dealt with by the police are so numerous—30,000 to 35,000 arrests a year for indictable crime in London alone—that it would be impracticably costly to have legal assistance in all of them. The argument is particularly strong for trivial offences like parking and speeding, where the defendant pleads guilty ; some countries allow fines to be imposed by the police without bringing such cases into court at all, and it would be an excess of formality to require a lawyer to be engaged to present the case. The police tend to employ solicitors or counsel where the case is likely to be contested strenuously by the defence (*e.g.*, on a charge of a sexual offence like indecent exposure where there is no plea of guilty), or where the case is one on which public opinion may be aroused against the police for supposedly oppressive enforcement of the law, or where the testimony of the police is likely to be challenged (*e.g.*, on a charge against a night club, or of dangerous driving), or where the case is one of difficulty on the facts or the law (*e.g.*, obtaining by false pretences). Some Chief Constables make a practice of obtaining legal representation whenever the defendant is represented.

This kind of compromise does not satisfy all critics, who point with admiration to the Scottish system of the procurator-fiscal and his assistants who conduct all public prosecutions. A recent expression of this point of view is the admirable *Spotlight on Justice* published by the *Daily Mirror*—perhaps the first effort to investigate the working of English criminal justice by team methods. The authors of this survey advocate the adoption in England of a system similar to the Scottish one.

### *No rights of police advocacy where the case is to go for trial*

It is generally agreed by those who have studied the subject that where a case is to go for trial before a jury the police must be legally represented even at the preliminary hearing. The reason is that the informant has no statutory right of audience before examining magistrates. This was pointed out by the Roche Committee (para. 59), and the Metropolitan Police accordingly make a practice of being legally represented at the hearing. Many Forces in the country, however, make a practice of acting as advocates even in these cases, and are permitted by the local Benches—quite irregularly, it seems—to do so. An instance is the case of *Gardner,* referred to above, where a member of the Liverpool City Police was evidently allowed by the magistrates to conduct the case for the prosecution at the preliminary hearing. The technical impropriety of this course is emphasised by the fact that the Magistrates' Courts Act and the Rules made under it refrain from extending the right of police advocacy, notwithstanding the recommendation of the Roche Committee (para. 61) that the law should be altered to give the informant the same right of advocacy in cases that are to go for trial as those that are tried summarily.

It must be admitted that the present rule is somewhat inconvenient, for it may not be known before the case whether the defendant will consent to summary trial (in a case where he is allowed to do so) or whether he or the justices will insist upon the case being treated as one to go for trial on indictment. A police officer may come prepared to take the case himself on the assumption that it will be tried summarily, and then find in court that it is to go for trial. In strict law the officer who has been conducting the case must now hand over to a lawyer. This will generally mean an adjournment; but the police do not like asking for an adjournment when the defendant elects to go for trial, because it may wear the appearance of victimising the defendant. In this unhappy dilemma the usual practice is for the police advocate to continue the case notwithstanding that the offence is being treated as indictable, so that technically he has no right to be heard. If, however, the police can foresee from the outset that the case is likely to go for trial, as where the charge is of being in charge of a motor vehicle when under the influence of drink, it is the practice of some Chief Constables to engage a solicitor. Others, however, think it proper for the case to be taken by a senior officer even when it is to go for trial, provided that the Bench has not to be addressed, but obtain legal representation if a speech has to be made. It seems unfortunate that the legality of police practices that many will think reasonable should be left in doubt.

### *The clerk to the justices taking the case for the prosecution*

The lack of a regular system of public prosecutors has frequently meant that the clerk to the magistrates has taken it upon himself to question the witnesses for the prosecution in order to elicit their evidence. His purpose may be to help a police officer or other lay prosecutor, or to secure that the rules of evidence are not violated by inexpert questioning. The Roche Committee pointed out the undesirability of the practice, because it seems to turn the clerk into a partisan, which is undesirable when he may have to retire with the bench to advise on the case. The clerk cannot question witnesses efficiently unless he has seen a proof of their evidence; but the witness when in the box may diverge markedly from his proof, and it then becomes anomalous that the clerk should be in possession of statements that have not been given in evidence. The Committee thought that the clerk should do as little of the examination of witnesses as is possible, and it was for this reason that the Committee thought that the informant's right of advocacy should be extended to cases dealt with by justices as examining magistrates. Nothing has been done, and criticisms of the clerk's "advocacy" continue to be voiced. See, for example, the Conservative statement of post-war policy entitled *Looking Ahead,* p. 21.

### *The clerk to the justices acting as instructing solicitor*

Another regrettable confusion between the prosecuting and judicial functions occurs where the clerk to justices who have committed a man for trial then proceeds to act as solicitor for the prosecution by briefing counsel. This is prohibited to clerks to borough justices and to stipendiary magistrates, but is still legally possible for clerks to county justices. The practice has been condemned by the judges (*e.g., R.* v. *Ely JJ., ex p. Mann* (1928) 45 T.L.R. 92) and by the Roche Committee (paras. 67–68), and Bills have been introduced from time to time in Parliament with the purpose of abolishing it, but without success (Howard, *Criminal Justice in England,* p. 211). It is, however, much less frequent now than formerly, and has been altogether abandoned in a number of counties. The obvious reason for objecting to the practice is that it gives the clerk a financial interest in having a man committed for trial, when it is his duty to advise the justices impartially on whether he is to be so committed, or discharged, or (if he so requests and the law allows) tried summarily.

# Aspects of Forensic Science

By WILSON R. HARRISON, M.SC., PH.D.
*Director of the Home Office Forensic Science Laboratory, Cardiff*

## Recent Developments in Document Examination

The eminent counsel rose slowly to his feet and faced the most famous "Handwriting Expert" of the day. "What about that dog?" was his first question. "What dog?" incautiously replied the witness. "That dog the Lord Chief Justice said only last week that he wouldn't hang on your evidence" came the crushing reply.

Many years have gone by since such a scathing attack on a so-called "Handwriting Expert" was considered justified, and such tactics and comments are unlikely to be encountered by any qualified document examiner giving evidence today. This is not entirely due to changes in the style of advocacy, which nowadays is pitched on a much gentler note. So many advances have been made in connection with the scientific examination of documents in methods, apparatus and in presentation, that the conclusions of experienced and competent document examiners are now received with the same respect as that accorded to most expert scientific testimony.

Not only is the modern document examiner much better equipped to carry out his often difficult work but the respect now afforded to his findings is undoubtedly due to a fundamental change in the mode of presentation of his evidence.

Gone for ever are the days when practically all that was offered consisted of an "opinion" which almost invariably proved to be subjective, being supported only by a claim to many years' experience in such work. As experience generally proved that there were available nearly as many widely differing "opinions" as there were "experts" consulted, it is no wonder that ridicule formed the chief weapon in cross-examination. Purely subjective opinions are rarely, if ever, offered today, and in many cases, once the indisputable facts have been laid before the court the only conclusion which can be drawn is so obvious that any expression of opinion by the witness is quite superfluous.

Nowadays it is the main concern of the document examiner to display to the court, often by the production of suitable photographs, the facts concerning which there can be no dispute, before he proceeds to interpret their significance in the light of his experience. Everyone concerned in the case is then in a position to appreciate for himself the grounds on which the matter has to be decided. Cross-examination need no longer be confined to the ridiculing of experts in general and document examiners in particular, but can be directed at the various points in issue and so can be made of real value to the court.

By the term "facts" is meant such features as the presence of pencil associated with the ink line of a questioned signature as revealed by infra-red photography, the fine details of the structure of a handwriting as shown in enlarged photographs, or the degree of misalignment of a specimen of typescript measured by comparison with an engraved scale.

It is obvious that the ability of the expert witness to place before the court such evidence as the foregoing is limited by the power and scope of the apparatus, methods and materials available to him, assuming he has the ability to take advantage of these facilities.

Photography plays an increasing part in document examination and without its aid it would be impossible for any worthwhile evidence to be placed before a court in such a way that all concerned are equally well placed to appreciate what is being dealt with.

### *Photographic lenses*

A great disadvantage of the early photographic lenses was that they gave distorted images which, whilst acceptable for portraiture or landscape work, were quite unsuitable for many scientific purposes. Because of this, many courts excluded photographs of documents as well as any evidence obtained by photographic methods, on the grounds that the inevitable distortion precluded any photographs from being a true record. Photographic lenses have been improved to such an extent that the amount of distortion present in any properly prepared photograph, even with extreme enlargement, is so small that it would require the most refined methods to demonstrate its presence. This has removed the last obstacle to complete reliance being placed on what is revealed by any properly prepared photograph. The emphasis placed upon the condition "properly prepared" is deliberate, because even with the best of equipment it is possible or even easy for an unskilled or unscrupulous person to prepare photographs which give a completely false representation of what they purport to show.

Unfortunately for the document examiner, the improvement in definition of a lens has been achieved by a large increase in the number of components in the lens and every increase in the number of glass-air surfaces at which reflection of light can take place results in a reduction of contrast in the final picture.

This loss of contrast is a serious matter for the document examiner who, when he wishes to decipher faint impressions for which the photographic process is ideally suited, endeavours to maintain and even increase contrast by modification of the processing procedure. A photograph which has insufficient contrast for this purpose is useless in spite of the high degree of correction shown by the lens.

The position has been relieved by the recent development of a "blooming" process for lenses. This treatment endows each glass surface with an extremely thin layer of a material of the correct refractive index. This has the effect of cancelling out the greater part of the reflected light so that even a highly corrected modern lens of many surfaces can now be expected to maintain a degree of contrast which hitherto has only been possible with single-component lenses which are ruled out for most purposes because of the distortion they produce.

### *Photographic emulsions*

Even the best lens is of little use if the photographic emulsion of the negative material with which it is to be used has insufficient resolving power. Resolving power is the ability of a photographic emulsion to reproduce a set of fine lines on a document as a group of equally well defined lines in the final photograph instead of as a grey blurred area which would be produced if the resolving power of the emulsion were not equal to the demands made upon it.

The fairly recent introduction of certain new emulsions such as "Kodalith" by Kodak and "Formalith" by Ilford means that as far as resolving power is concerned, the document examiner now has all that he can wish for in this respect. Associated with these new emulsions is a special developer and a process of development known as "Fine Line," which further enhances the power of these new emulsions to reproduce those fine lines on a document which would tend to get lost with conventional methods of development.

To carry out development on "Fine Line" principles, the negative is agitated in the developer in the normal manner until the image makes its appearance. At this stage, agitation is stopped and the negative is allowed to continue its development in the still bath until the image is fully developed. In this way, the development of any area on the negative is influenced by the presence of the products of the development which has already taken place. If the agitation were not stopped, these products would diffuse into the developer so that all areas would receive similar treatment and so defeat the object of the special technique which is to prevent spreading of the image into areas not affected by the light.

The new emulsions referred to, together with the " fine line " method of development, have revolutionised the document examiner's ability to reproduce, enhance and consequently decipher faint impressions such as those left where there has been an erasure of pencil writing which would otherwise escape notice, much less lend themselves to being deciphered by any other method.

### *Eliminating surface marks*

In spite of the improved lenses and negative material now available, the photography of documents still presents many problems, especially where it is required to make an exact photographic reproduction of the markings on the surface of a document for presentation in court.

Very few documents are substantially flat, and unless a document is evenly lit, the background of white paper will be reproduced as varying shades of grey owing to the differing amounts of light reflected into the camera by the unevenly lit surface of the paper produced by conventional methods of illumination.

In extreme cases, some areas of the document are reproduced as an extremely dark grey on which it is difficult to read faint writing, whilst in other places known as " hot spots " there will be such a powerful reflection of light that any writing on these areas is completely blotted out. The even lighting which is essential if a suitable photograph is to be made is by no means easy to ensure by any conventional method, but this problem has been completely solved at the author's laboratory in a very simple manner.

Any document to be photographed is held by gentle suction on to an opaque surface which is suspended inside a large box whose inside walls have been painted all over with a matt white paint. A gap of about six inches is left between the edges of the document holder and the walls of the box. A lamp is placed in the centre of the wall facing the back of the document holder so that there is no direct view of the lamp from a hole in the centre of the opposite wall of the box through which the lens of the camera looks.

When the box is closed and the lamp is switched on, the inside of the box is bathed with a soft even light which illuminates the whole of the surface of the document so evenly that any creases on the document fail to be reproduced as such on the negative. Hot spots are absent, and if the surface of the paper is clean and even in tint, then the background on the final photograph will show up in an even shade of grey. If a photograph taken with this apparatus shows a darker patch anywhere then it can confidently be assumed that this patch has a real existence on the document and is not the result of uneven lighting.

This method avoids the use of a sheet of glass to flatten the document, a dangerous procedure which is still used by many who should know better. If glass is employed in this way, there is always the danger of spurious effects appearing on the negative which are caused by multiple reflection between the dyestuff of the ink and the surfaces of the glass. On one occasion, the author was shown an enlarged photograph of a questioned signature which appeared to present a ragged and patched line. When, however, the original signature was examined under the microscope no such effect could be seen. The faulty photograph was eventually discovered to have been taken beneath a thick sheet of glass which had caused the reflections which gave rise to the suspicious appearance of the signature.

### *Photographic filters*

To supplement the improved lenses and emulsions now available, the document examiner has at his disposal a much wider range of filters than hitherto. In the past, he was often handicapped in his investigation of a forgery by the lack of a filter which would show up any fraudulent additions made with a different ink. This need never happen today because filters of any required characteristics may be found amongst those commercially available.

### *Light sources*

Both photography and visual examination of a document depends on the availability of light sources which are suitable both as regards power and the nature of the radiation emitted.

The quartz lamp which generates ultra-violet light by discharge through mercury vapour has been known and used for many years, but it is only recently that the importance of employing a carefully surfaced Wood's glass filter when the lamp is being used for photography has been realised. Many of the patchy photographs produced in the past owe their appearance to a faulty filter.

The mercury lamp produces line spectra and if a continuous ultra-violet spectrum is required other sources must be considered. The best of these is the high intensity hydrogen discharge lamp which is now commercially available at a reasonable price.

For an intensive source of white light suitable for microscopic examination and especially photomicrography, the xenon discharge lamp is unsurpassed, its only disadvantage being the comparatively high cost of the associated control equipment.

If light which is substantially monochromatic is required, there are now commercially available high intensity discharge lamps of small size such as the sodium lamp which is an excellent source of D line radiation. Similar lamps with other gases such as argon and neon are also manufactured.

For infra-red radiation the best sources are still the gas-filled tungsten filament lamps which are manufactured in a multitude of forms for projection lamps in optical equipment.

### *Microscopes*

The critical examination of a document demands the use of a microscope. Good microscopes have been readily available for many years but there is no doubt that the work is greatly facilitated by the use of a modern stereoscopic instrument. For certain problems such as those posed by the determination of the order of writing of intersecting strokes such an instrument is essential. It would be difficult to make even a start on this problem without employing a microscope which shows everything in perspective.

### *Measuring instruments*

Measuring instruments have been improved out of all recognition and the " reliable metal scale sub-divided into sixty-fourths of an inch " so often referred to in the older books has been completely superseded by measuring machines based on optical principles. With these instruments, observations are made through a microscope with cross wires in the eyepiece. Engraved scales made of an alloy which does not change its dimensions with alteration of temperature are incorporated in these instruments, so that reliable measurements which are correct to less than a hundredth of a millimetre are well within their scope. No document examiner can ask for more than this.

The addition of a gonimeter eyepiece enables angles to be measured to a fraction of a degree so that the cumbersome and fragile engraved glass scales and protractors used by the past generation are no longer required.

It will be realised that all the advances which have so far been referred to are the result of the considerable development which has taken place in physics during the past fifty years, but during this period the chemists have not been idle.

### *Analysis of ink*

Consult any book on the scientific examination of documents which was published more than ten years ago, and it will be seen that the chemical tests for ink which it outlines are simple spot tests designed to show the type of ink which had been used on a document. These tests are of limited application nowadays when practically all writing is done with one of two classes of ink. The first, by far the most popular, consists of an aqueous solution of a synthetic dyestuff whilst the other consists of a solution of one of about thirty dyes reinforced by the addition of the iron salts of gallotannic acid to form what is known as blue-black ink.

Until the recent development of electrophoretic and chromatographic methods of analysis, there was no known procedure by which the dyestuffs present in an ink line could be identified. It is not generally realised what a difficult problem is presented by the analysis of an ink line on a document. Even the most concentrated ink contains but a small percentage of solid matter, the rest being water, and when one considers what a large amount may be written at one filling of a fountain pen, few of which hold more than a thimbleful or so of ink, some idea may be gained as to the extremely small amount of solid matter which is present in the amount of an ink line which can be sacrificed without seriously defacing the document.

Nowadays, a few tiny drops of either water or dilute acid are applied to the chosen portion of the ink line by means of a tiny glass tube with a hair-thickness bore. When the liquid has loosened sufficient of the substance of the ink, the same tube is used to transfer the liquid to a strip of filter paper where it dries a small spot.

Even this operation is not as simple as it sounds, for it is difficult to persuade the inky extract to leave the fine glass tube, an appreciable proportion staying behind unless the tube has been treated with a special silicone fluid which renders the glass water-repellant. If this is done, there are no losses in transferring the liquid from the document to the filter paper.

Once the ink spot on the filter paper strip is dry, it can be treated by one of two methods each designed to separate out the various constituents of the ink along the strip as a preliminary to their identification in a spectrophotometer.

The first method is to allow a suitable solvent to diffuse along the strip. If the solvent is properly chosen, then the various constituents of the ink will be carried at different rates along the strip by the passage of the solvent. Once this separation has been accomplished, the strip can be cut at the appropriate places as a preliminary to the extraction and identification of the ink constituents.

The second method, which is of more recent development, is to accelerate the separation of the constituents of the ink by means of an applied electric potential of up to some hundreds of volts.

Separation by solvent diffusion is known as chromatographic analysis and the separated material along the strip is known as a chromatogram. A chromatogram of an ink may have of itself great evidential value because different inks usually produce different chromatograms. It is quite practical to produce a chromatogram in court as its significance may easily be explained to the court in spite of the difficulty of preparing it.

If the separation is accomplished by the action of an applied voltage, then the method is known as electrophoretic analysis. Both chromatographic and electrophoretic methods are admirably adapted for work on inks as they are most effective where microgramme quantities of material are involved.

Chromatography has been extensively used by chemists in research work on the vitally important compounds known as proteins. This work has involved the identification of extremely minute amounts of such substances as amino-acids and related compounds which are the product of protein hydrolysis. After considerable research work, a substance known popularly as "ninhydrin" has been developed for this purpose. Ninhydrin produces a red-purple colour with amino-acid-like substances even when they are present in extremely small concentrations.

*Finger-prints on documents*

Ninhydrin has been used with considerable success for disclosing the presence of finger-prints on paper. Classical methods for developing finger-prints rely on the moisture which is left behind. The presence and position of this moisture is made visible by dusting the object with an intensely coloured powder such as graphite. When the excess is removed by blowing or careful dusting, the adherent powder which remains outlines the finger-print.

Whilst freshly made finger-prints on paper may be successfully developed with graphite, the usual effect of this powder is to cover the paper with a closely adherent black veil which turns to a series of smears if an eraser is used in an effort to remove it.

A finger-print contains a minute amount of amino-acid-like substances, and when a sheet of paper bearing a finger-print is sprayed with an acetone solution of ninhydrin, the finger-print is clearly revealed when the paper is heated for a short time in an oven to about 80° C.

Although this process is fairly new, it has already been attended with considerable success. If the paper is well washed with acetone after the development of the finger-print the excess ninhydrin is removed with no effect on the developed finger-prints.

*Infra-red rays*

It sometimes happens that speed in the examination is essential when a large number of documents have to be examined in the course of a police investigation. If a document is being examined by infra-red rays, then until fairly recently, the only process available was one involving photography. Even with the fastest infra-red plates, exposures are long so that an examination is necessarily a lengthy and incidentally an expensive process because infra-red-sensitive plates are not cheap. Photography is essential because the human eye is not sensitive to infra-red radiation.

The recent development of photoelectric cells which are sensitive to infra-red radiation together with the progress made in the study of electron optics which allows of the focusing of electron beams, has made possible the production of an apparatus which allows a document to be examined by infra-red light and the results of the examination to be appreciated visually.

With this apparatus, the document is lit with a powerful source of light such as a thousand watt spot light. By means of a conventional lens system the image of the document is focused on to the cathode of a caesium photoelectric cell through a filter which cuts out all but the infra-red rays.

The action of the infra-red light on the caesium cathode is to cause an emission of electrons proportional to the amount of light falling on the cathode. By the application of suitable electric and magnetic fields, the electrons emitted are both accelerated and focused on to a fluorescent screen which glows with a visible reproduction of the image which is being focused by the infra-red rays from the document on to the caesium cathode.

The resolving power of the latest image converter tubes, as the instrument is called, is about a hundred lines to the centimetre and an electric magnification of about twice to three times may be gained in the tube. This means that the definition of such apparatus is all that is required for visual examination of a questioned document by infra-red.

It may lightly be assumed from the foregoing that with the advent of modern techniques and apparatus all the problems facing the document examiner are now capable of swift and easy solution. This, unfortunately, is by no means the case. Many old problems, such as the determination of the age of an ink writing, remain as intractible as ever, and some modern inventions have brought new problems in their train.

A case in point is the invention and wide adoption of the ball-point pen, which has made more difficult the work of the document examiner. The analysis of ball-point pen inks is by no means a simple matter, which is made all the more difficult by the protean nature of the inks being used.

Efficiency in the examination of documents can only be achieved by ceaseless application of all modern apparatus and the associated techniques to both the old problems and the new as they are encountered. No efficient document examiner can afford to relax his efforts in the application of recent advances in physics and chemistry in his endeavour to discover and demonstrate the true facts of a case.

# *Practice and Procedure*

## Magistrates' Courts

### *Evidence of drink in dangerous driving prosecutions*

When an arrest is made for the offence of driving a motor-vehicle whilst under the influence of drink the police invariably endeavour to arrange for the defendant to be medically examined before they decide whether or not to prefer a charge. If the doctor who is called in by the police is unable to certify that, at the time of the examination, the defendant's condition warrants the charge, it is usual not to proceed with it but to take out summonses, in appropriate circumstances, for dangerous and/or careless driving. At the hearing of such summonses some magistrates' courts allow evidence to be given of the arrest which, of course, involves an allegation that the defendant had been drinking prior to the incident in question. Other courts hold that any mention of this aspect of the defendant's condition is inadmissible.

There appears to be no decided case on the point and courts which admit such evidence presumably base their ruling on the words " having regard to all the circumstances of the case " which, in section 11 (1) of the Road Traffic Act, 1930, define the danger necessary to constitute the offence of dangerous driving. No such words are found in section 12 and consequently it would seem difficult to justify the admission of this kind of evidence when the only summons issued is one alleging driving without due care and attention or without reasonable consideration for other persons using the road. Even in the case of dangerous driving it can be argued very strongly that no mention of drink should be made when the prosecution's case is put forward.

" Having regard to all the circumstances of the case " must, of course, refer to relevant circumstances. That means they must have some bearing either on the defendant's manner of driving or on the danger which was to be apprehended in the conditions obtaining at the time and place in question. Accordingly, the defendant's consumption of alcohol will only be relevant if it can be related to his driving on the occasion of the alleged offence. The speed of his reactions to road conditions is obviously very important in this connection and it is common knowledge that drink may affect these reactions. But the alcoholic refreshment taken by the defendant may have been too small in quantity to have had any measurable effect on his judgment or reflexes. In that case the fact that " he smelt strongly of drink " will be irrelevant, and, if given in evidence, will only tend to cause unfair prejudice against him. The question of drink only becomes relevant on the assumption that the prosecution are suggesting that it had a deleterious effect on the defendant's driving. If this suggestion is made, however, it is difficult to avoid the inference that the defendant is being alleged to have been under the influence of drink to such an extent as not to have had proper control of his vehicle. " Proper control " surely cannot be said to exist in a case where drink has adversely affected driving. But it is contrary to the general law of evidence to allege against an accused person a crime other than that being tried. None of the exceptions to this rule appear to cover the circumstances under consideration, when evidence for the prosecution is being given.

Admittedly it is probable that, in many a case of this kind, the defendant's driving *was* affected by drink—although the medical evidence was not strong enough for the appropriate charge to be preferred with much hope of success. Indeed, many people, including some doctors, consider that any consumption of alcohol is bound to have some bad effect on a driver's reactions. But opinions and conjectures of this sort can hardly be allowed to weigh against a defendant charged with dangerous driving. The law frowns on a motorist who has taken drink only if he is proved to be under its influence to the extent of not having proper control of his car. It makes no other demand for abstemiousness on the part of a driver. Consequently there seems no justification for the prosecution in a dangerous driving case to hint at some lesser influence of drink which does not warrant a charge under section 15 of the Road Traffic Act, 1930, but which nevertheless affects the defendant's capacity as a driver. It is true that, if the accused in such a case puts his character in issue, he may be questioned to show that he has committed some other offence. But any court could be forgiven for looking with disfavour on cross-examination directed to show that a defendant charged with dangerous driving, who had given evidence of his previous good record as a driver, was really under the influence of drink on the occasion in question.

[A. E. JONES.]

## *Summary Justice*

*Animals*

Dogs. Allowing dog to attack chickens; ten chickens said to have been killed; fined £1; Pennington: Guildford Magistrates' Court (*Evening Standard*, January 6).

Operation. Two farmers performing operation on horse without administering anaesthetic; horse injured itself struggling and had to be destroyed; each fined £7 10s.; Amies, Amies: Kidderminster Magistrates' Court (*Birmingham Mail*, January 26).

*Children*

School attendance. Father allowing two children to attend Christmas party instead of going to school one afternoon; fined 10s.: Leamington Magistrates' Court (*Birmingham Mail*, January 30).

*Customs and excise*

Banknotes. Being knowingly concerned in the attempted exportation of twelve £5 notes; fined £50; Evans: Birmingham City Magistrates' Court (*Birmingham Mail*, January 19).

*Damage*

Fire. Putting lighted matches in a pillar-box, damaging twenty-eight letters; fined £10, with alternative of two months' imprisonment; McDonnell: Liverpool City Magistrates' Court (*Liverpool Evening Express*, January 6).

Public telephone. Tearing telephone from the wires in a public call-box and throwing it over a wall because he could not get a reply from a particular number; fined £2, ordered to pay 30s. damages: King: Birkenhead Magistrates' Court (*Liverpool Evening Express*, January 4).

Trying to put a dustbin through a window of a friend's house while drunk; fined £1, ordered to pay 9d. costs and for damage done; Sampson: Wakefield West Riding Magistrates' Court (*Wakefield Express*, December 24, 1955).

*Firearms, explosives and offensive weapons*

Firearms. Carrying a gun on a highway without a licence and wantonly firing off a gun within fifty feet of the centre of the highway; fined £1 for first offence, £2 for the second and ordered to pay £2 2s. 9d. costs; Hancock: Halifax West Riding Magistrates' Court (*Yorkshire Evening News*, December 28, 1955).

*Gaming*

Automatic machines. Using café for the purpose of receiving money on a game of chance by means of an automatic machine; fined £30; Perrett: Chepstow Magistrates' Court (*South Wales Echo & Express*, January 17).

*Larceny, etc.*

Fraud. Falsifying time-sheets relating to hours of work with intent to defraud; fined £10, ordered to pay back the extra money which he had received: Bettison: Leeds Magistrates' Court (*Yorkshire Evening Post*, January 5).

Larceny. Stealing £5 3s. from the gas meter at his home; fined £1, ordered to pay 1s. 8d. costs and to repay the Gas Board; Braime: Wakefield West Riding Magistrates' Court (*Wakefield Express*, January 7).

Larceny. Stealing £3 from the meter at her home and fraudulently extracting electricity worth £37 by using same shilling again and again; fined £10, ordered to repay Electricity Board; Murray: Dartford Magistrates' Court (*Evening Standard*, January 12).

*Local by-laws*

Park. Youth, aged 17, using swings in park when over the age of 14; granted conditional discharge; Moxon: Wakefield City Court (*Wakefield Express*, January 7).

*Master and servant*

Building regulations. Building contractors failing to provide guard rails and toe boards on side of a working place from which workman could fall more than 6 ft. 6 ins.; workman fell and was killed; fined £100; William Thornton & Sons: Liverpool City Magistrates' Court (*Liverpool Evening Express*, January 5).

Mine. Shotsman failing to test for inflammable gas and failing to post a sentry; fined £1 for each offence; Thomas: Tredegar Magistrates' Court (*Yorkshire Evening Post*, January 13).

*National service*

Conscientious objector refusing to comply with a Ministry of Labour direction to work as a hospital porter or on the land:

sentenced to six months' imprisonment: Havard: Brentford Magistrates' Court (*Evening Standard,* January 25).

*Post Office*

Telephone. Making free call from telephone box by using special system of dialling; accused of fraudulently consuming electricity worth 3d. the property of the G.P.O.; fined £3, with alternative of a month's imprisonment; Eddon: Clerkenwell Magistrates' Court (*Evening Standard,* January 6).

*Railways and ships*

Level crossing. Two men opening level crossing gates so that they might drive van across lines; summoned for trespass; each fined maximum fine of £2; Muskett, Muskett: Howden Magistrates' Court (*Wakefield Express,* January 7).

Railway station. Parking car at railway station for three days, " a period longer than necessary to transact any lawful business upon the railway "; fined 30s.; Willey: York Magistrates' Court (*Yorkshire Evening Post,* January 5).

*Road traffic*

Licence. Failing to comply with the special conditions attached to a " B " carrier's licence; fined £7; Bullock: Wythall Magistrates' Court (*Birmingham Mail,* January 6).

Provisional licence. Driving a tractor without " L " plates when he was the holder of a provisional licence; fined £1; Parkinson: Wakefield West Riding Magistrates' Court (*Wakefield Express,* December 31, 1955).

Dangerous load. Having cages containing a lion and seven small lionesses on a trailer which slipped while trailer being driven along by-pass; fined £3; Simmons: Hendon Magistrates' Court (*Evening Standard,* January 26).

Registration of car. Three men who each owned a car in turn for only four or five days failing to notify the registration authority of changes of ownership of the car; each fined £2; Giles, Temple, Denton: Bedford Magistrates' Court (*Manchester Guardian,* January 30).

Speeding. Commercial representative summoned for fifth time in thirteen months for exceeding speed limit; fined £30; Poole: Walsall Magistrates' Court (*Birmingham Mail,* January 4).

Lighting. Using a fog lamp fitted less than two feet from the ground and in conditions other than of fog or snow; fined £1; warning that more severe fines would be imposed in future for similar offences: Magee: Chester Castle Magistrates' Court (*Liverpool Evening Express,* January 25).

Bus. Failing to pay fare on a public service vehicle; fined 10s.; Hore: Bootle Magistrates' Court (*Liverpool Evening Express*, January 30).

*Sale and trade*

Weights and measures. Wood dealer selling three underweight loads of firewood to schools; fined £6, ordered to pay £3 3s. costs; Shedden: Hendon Magistrates' Court (*Evening Standard*, January 19).

Heating appliances. Second-hand dealer and his wife displaying for sale in their shop electric and gas fires not fitted with guards; each fined £2; Tomkins, Tomkins; Smethwick Magistrates' Court (*Birmingham Mail*, January 16).

*Trespass*

Game. Trespassing in search of game; fined £2; Lewis: Oundle Magistrates' Court (*Northamptonshire Evening Telegraph*, January 20).

# Case and Comment

The reports of cases to which initials are appended hereunder have been specially prepared for *The Criminal Law Review* by the following reporters:—

HENRY PALMER, *Barrister-at-Law*.
J. D. PENNINGTON, *Barrister-at-Law*.

**Carnal Knowledge**—*Sentence*. See R. *v*. KING, p. 209, below.

**Conspiracy**—*Conspiracy to accuse of an offence*

CONTEH *v*. THE QUEEN [1] (Judicial Committee of the Privy Council: Lords Oaksey, Tucker and Somervell of Harrow: January 11, 1956) ([1956] 2 W.L.R. 277).

The dead body of F. was found near Daru, Sierra Leone, in the chiefdom of paramount chief S. Following the discovery, the police, on the sworn information of one of four appellants, arrested four persons and charged them with the murder of F. The prosecution's case—that F. was killed for the purposes of cannibalism—was based mainly on the statements of the fourth accused M., who had confessed to the killing with the aid of his three co-accused, all of them said to be acting under S.'s directions. At the trial M. retracted, saying that he had incriminated himself and the others at the instigation of the appellants all of whom, he alleged, desired the removal of S. from his position of chief. The four accused were acquitted. The appellants were thereupon prosecuted for the common law offence of conspiracy to accuse S. and those acquitted of a crime. At the beginning of the proceedings counsel for the appellants objected to one of the assessors on the ground that he was married to a daughter of S., the object of the alleged conspiracy, and the first witness for the prosecution. The judge held that the objection was misconceived. In his summing up, the judge referred to evidence which would support an agreement to accuse another of a crime falsely if it were believed, but he did not state the necessity of proving the falsity of the belief. The appellants were convicted. They appealed.

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[1] For the appellants: *Dingle Foot Q.C., R. K. Handoo* (instructed by T. L. Wilson & Co.). *J. G. Le Quesne* (instructed by Charles Russell & Co.) appeared as *amicus curiae*.

*Held,* allowing the appeal, that the gist of the offence was that the accusation should be false to the knowledge of those conspiring. In the present case the judge failed to state the necessity of the prosecution establishing that the appellants knew the accusation to be false, and therefore, the convictions should be quashed.

*Per curiam*. The objection to the assessor was not misconceived. Either party was entitled to raise an objection to an assessor on the ground that he was interested in or connected with the subject-matter of the proceedings. It was for the judge to rule on the objection in his discretion. [J. D. P.]

COMMENTARY. A conspiracy is an agreement to commit any offence and it is indictable whether the offence is punishable on indictment or on summary conviction; see further Archbold, 33rd ed., 1472 *et seq*.

As regards this particular form of conspiracy Lord Mansfield in *R.* v. *Rispal* (1762) 3 Burr. 1320 said that the gist of the offence was the unlawful conspiracy to do an injury to another by a false charge. See also Russell, 10th ed., 1816 *et seq*.

### **Evidence**—*Bankers' books—books of Canadian bank*

R. *v*. ROSE [2] (Winchester Assizes: Finnemore J.: November 30–December 13, 1955).

R. obtained large sums of money by stating that he had 300,000 dollars in the Royal Bank of Canada. It was proved that the

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[2] For the prosecution: *H. J. Phillimore Q.C.*, *M. McGougan* (instructed by Director of Public Prosecutions). For the defendants: *H. J. M. Tucker*, *Robert Hughes* (instructed by Philip Evans & Co., Bournemouth); *G. L. Impey* (instructed by Critchley & Carpenter, Bournemouth).

Royal Bank of Canada had a branch in London which made returns to the Commissioners of Inland Revenue.

*Held,* the Bankers' Books Evidence Act, 1879, extended to Canadian branches of the Royal Bank of Canada.

[A. R. Tyrrell, *Barrister-at-Law.*]

COMMENTARY. The Bankers' Books Evidence Act, 1879, applies to " any person [etc.] . . . carrying on the business of bankers and having duly made a return to the Commissioners of Inland Revenue . . . " and enables copies of entries in bankers' books to be accepted as *prima facie* evidence of the matters etc. recorded therein. There appears to be no previous decision concerning an overseas bank. It will be remembered that in *R.* v. *Lewis* [1955] Crim.L.R. 374, the Act was held inapplicable to the Bank of England.

See also p. 198, below.

**Evidence**—*Character—putting character in issue*

R. *v.* SAMUEL [3] (Court of Criminal Appeal: Lord Goddard C.J., Hilbery and Stable JJ.: January 23, 1956) (*The Times,* January 24, 1956).

S. was convicted at the County of London Sessions of larceny by finding and sentenced to nine months' imprisonment. The facts, shortly, were that a camera, which had been lost some five weeks earlier by a little girl in the grounds of a museum, had been found in S.'s possession. S. said at the trial that he had intended returning the camera, and gave evidence that on two previous occasions he had found property belonging to somebody else and had handed it back. The Chairman ruled that, in these circumstances, the accused had put his character in issue, and, accordingly, S. was cross-examined as to his previous convictions. S. appealed to the Court of Criminal Appeal against his conviction on the main ground that cross-examination as to previous convictions was improperly allowed. It was contended that the evidence given by S. about handing back other property was not evidence of " good character " within the meaning of section 1 of the Criminal Evidence Act, 1898, and that " character " in that context meant general good character and reputation.

*Held,* dismissing the appeal, that the only effect of the evidence given by S. could have been to induce the jury to say that when S. found property he gave it up, or, in other words, that he was an honest man. That entitled the prosecution to show that there were other occasions when S. had not dealt honestly with property. The simple issue was: Did the appellant put his character in issue? In the opinion of the court, he clearly had, and the appeal would, therefore, be dismissed. [H. P.]

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[3] For the appellant: *R. N. Titheridge* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *Petre Crowder* (instructed by the Solicitor, Metropolitan Police).

COMMENTARY. There has been no clear definition of the term " good character " in the connection used here. Lord Simon L.C. when delivering the judgment in *Stirland* v. *D.P.P.* [1944] A.C. 315, considered its meaning and came to the conclusion that it included both the prisoner's general reputation which he bore in his own circle and his real disposition as distinct from what his neighbours might think of him. The evidence given in this case clearly comes within this broad definition though, if more is needed, *Stirland's* case is also authority for the principle that " [the accused] cannot assert his good conduct in certain respects without exposing himself to inquiry about the rest of his record so far as this tends to disprove a claim for good character ".

### **Evidence**—*Competency of wife—dangerous driving—evidence as to number of vehicles on road*

PARSON *v.* TOMLIN[4] (Q.B., Divisional Court: Lord Goddard C.J., Stable and Ashworth JJ.: January 19, 1956).

P. was charged with driving at a speed which was dangerous to the public having regard to all the circumstances of the case, including the amount of traffic which was actually at the time or might reasonably be expected to be on the road. The justices found that P. was driving at about 70 m.p.h. on a Sunday afternoon along a road on the outskirts of Aylesbury. The road was not within the 30 m.p.h. speed limit but there were houses on one side. A little girl, who was walking along the road with her father and sister, ran across the road. P. applied his brakes but the front of the car struck the child, killing her. P.'s wife was among the persons who gave evidence for the prosecution. Another prosecution witness was a policeman who gave evidence that he estimated the number of vehicles passing in both directions on the day in question would amount to 90 an hour, and that he checked the traffic at the place of the accident on a Sunday, several weeks later, and 192 vehicles passed in half an hour. The justices considered that P.'s wife was competent to give evidence, but, in any event, they did not consider that her evidence contributed to any extent to the case for the prosecution. They convicted P. P. appealed on the grounds, first, that his wife was not a competent witness for the prosecution, and secondly, that the policeman's evidence was inadmissible.

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[4] For the appellant: *Ryder Richardson Q.C.*, *R. Beldam* (instructed by A. D. Vandamm & Co.). For the respondent: *John Lawrence* (instructed by R. E. Millard).

*Held,* dismissing the appeal, that although P.'s wife was not a competent witness for the prosecution in the present case, that was not a ground for quashing the conviction, since there was abundant evidence to support it and the wife's evidence had not affected the justices' decision in any way.

*Semble,* if the wife's evidence had been of real importance and had had effect on the justices, the conviction would have been quashed.

The evidence of the police officer with regard to the number of vehicles passing along the road was relevant to the question of what traffic might reasonably have been expected to be on the road, and therefore admissible.

[Miss C. J. Ellis, *Barrister-at-Law.*]

COMMENTARY. The general common law rule is that a wife is not a competent witness for the Crown against her husband and, whilst there are exceptions to this rule, both at common law and by virtue of sections 4 and 6 (1) of the Criminal Evidence Act, 1898, there is no exception to the rule in relation to charges under the Road Traffic Acts.

See further Archbold, 33rd ed., 496 *et seq*; Phipson, 9th ed., 477.

### **Evidence**—*Rebutting evidence—retrial*

R. *v.* SMITH [5] (Huntingdonshire Quarter Sessions: S. L. Elborne, Esq., Chairman: October 14, 1955).

S. was charged with larceny of scrap metal at Eynesbury in Huntingdonshire. The prosecution's case rested principally on the fact that S.'s lorry had been seen at Eynesbury during the night of June 8, 1955, when the offence was committed. S.'s defence was an alibi and he called D. and H. to say that he was in their company at D.'s public-house near Peterborough, 30 miles away. from 10 p.m. on June 8 until the following morning. The jury disagreed. At the retrial S. put forward the same defence. The prosecution sought to call rebutting evidence to the effect that on the evening of June 8 D. was at Lincoln races (some 51 miles from Peterborough) with two other people, that the last race was at 9.5 p.m. and that they left the course at about 9.30. The Chairman ruled that as it was a retrial the defence had not in the circumstances taken the prosecution by surprise and the prosecution was not entitled to call rebutting evidence. S. was acquitted.

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[5] For the prosecution: *C. W. S. Lubbock* (instructed by Wade-Gery & Brackenbury, St. Neots). For the defence: *Gilbert Griffiths, R. M. O. Havers* (instructed by Philip Baker and Co., Birmingham).

[Miss Jean Fisher, *Barrister-at-Law.*]

COMMENTARY. Where there is a re-trial the fact that there has been a previous trial is usually irrelevant and therefore inadmissible: Phipson on *Evidence*, 9th ed., 48.

The prosecution are generally only allowed to call evidence rebutting the defence where the latter have introduced new matter which the Crown could not foresee, but in certain cases evidence may be called to rebut an alibi. In *R.* v. *Froggatt* (1910) 4 Cr.App.R. 115, 118, Phillimore J. explained this by saying: "You do not know what a prisoner is going to say in his defence. In some cases it would be impossible for the prosecution to deal with the alibi except by way of rebutting evidence, because the prosecution does not know that at the trial the prisoner may not set up some defence other than and inconsistent with an alibi, even though before the justices he set up an alibi." In *Froggatt's* case the defendant was charged with housebreaking in Leicester and his defence both before the justices and at his trial was that he was in Birmingham when the offence was committed. The prosecution called evidence rebutting this alibi and the Court of Criminal Appeal held them to be justified in the course they took.

D. was convicted at the Cambridgeshire Winter Assizes on one charge of perjury and H. on two charges of perjury based on the evidence given by them at the trial of Smith. D. was fined £100 and H. was sentenced to 18 months' imprisonment.

See Archbold, 33rd ed., 192.

**Evidence**—*Traffic lights.* See WELLS *v.* WOODWARD, p. 207, below.

**False Pretences**—*Valuable security.* See R. *v.* ROSE, p. 198, below.

**Food and Drugs**—*False description—chocolate milk*

MIDDLESEX COUNTY COUNCIL *v.* UNITED DAIRIES (LONDON) [6] (Willesden Magistrates' Court: Stanley Scott, Esq., Chairman: December 22, 1955).

The defendant company was summoned for describing flavoured sweetened skimmed milk known as "Lactachoc" as "the *real* milk chocolate drink" and as "ice cold chocolate milk", in each case on a poster displayed in one of the company's retail shops. For the prosecution it was submitted in respect of the first advertisement where the words " real milk " were used as adjectives that, although the meaning of words could vary according to their context (*e.g.* " ice cream " which is neither ice nor cream), as in relation to " Lactachoc " the description " the real milk chocolate drink " had not acquired a special meaning accepted by buyer and seller, then the word milk must be taken to mean " whole milk ", that being the common meaning of the unqualified word " milk " in trade. It was submitted in respect of the second advertisement, where " milk " was used as a noun, that as the article was not " milk " it could not be " ice cold chocolate milk ", just as an article that was not " vinegar " could not be " non-brewed vinegar " (*Kat* v. *Diment* [1951] 1 K.B. 34). It was argued for the company that this kind of drink was relatively new in this country, though well known in America as a " Chocolate Milk Drink ". The application of British food and drugs' laws to it was not clear. The article and its name had yet to become established and understood.

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[6] For the prosecution: Percy Burton, Deputy Chief Officer, Public Control Department. For the defence: *J. Malcolm Milne* (instructed by H. L. Thomas).

*Held,* the company was guilty; they were fined £5 in respect of each advertisement and ordered to pay 10 guineas costs.

[Public Relations Officer, Middlesex County Council.]

### **Food and Drugs**—*Sausages not of the quality demanded—meat content of pork sausages*

THRUSSELL *v.* WHITEMAN [7] (Q.B. Divisional Court: Lord Goddard C.J., Stable and Ashworth JJ.: January 17, 1956) (*The Times*, January 18, 1956)

The defendant was charged with selling to the prejudice of the purchaser pork sausages which were not of the quality demanded by the purchaser, contrary to s. 3 of the Food and Drugs Act, 1938. The justices found that the prosecutor bought from an employee of the defendant " one pound of pork sausages " for 2s. 8d. The public analyst analysed a sample of the sausages and certified them to have a deficiency of 11·5 per cent. in meat content based on a meat content of 65 per cent. When asked if he intended his sausages to contain any specific percentage of meat the defendant replied " No, we just make up the sausages and hope we are on the right side." The sausages were made from good quality pork, rusk, water and seasoning and had been hygienically prepared.

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[7] For the prosecutor: *Paul Wrightson* (instructed by Sharpe, Pritchard & Co. for H. S. Martin, Lewes). For the defendant: *Douglas Frank* (instructed by P. R. Kimber)

The defendant had supplied customers with sausages in accordance with this recipe for a number of years, and had never received any complaints. The justices were of opinion that, there being no longer a prescribed meat content of 65 per cent. for pork sausages the prosecutor was not prejudiced by the sale to him of sausages with a meat content of 57·5 per cent. and they dismissed the information. The prosecutor appealed.

*Held*, that there was evidence before the justices on which they could come to the conclusion that the sausages were pork sausages and the appeal would be dismissed.

*Per* Lord Goddard C.J.: The sooner it is seen that these cases lead to chaos and it is prescribed what a sausage is, the better. Every shopkeeper is at the mercy of a public analyst unless he goes to the expense of calling another. [J. D. P.]

COMMENTARY. This case follows closely *Marston* v. *Loney* [1955] Crim.L.R. 778.

**Forgery**—*Trade mark—intent to defraud*

*Re* VITAMINS LTD.'S APPLICATION [8] (Chancery Division: Lloyd-Jacob J.: November 24, 1955) ([1956] 1 W.L.R. 1; [1955] 3 All E.R. 827).

At the hearing of an appeal against the granting of an application to register the word "Pabalate" as a trade mark, it was contended by the opponents to the application that the registration of the mark would be disentitled to protection in a court of justice under s. 11 of the Trade Marks Act, 1938, because it would offend s. 2 (*a*) of the Merchandise Marks Act, 1887, under which a person is penalised who "forges any trade mark . . . unless he proves that he acted without intent to defraud."

*Held*, applying *Slatcher* v. *George Mence Smith* ([1951] 2 K.B. 631), that the "intent to defraud" referred to in s. 2 (*a*) must be found in the deliberate commission of the act which comprised the forging of the trade mark; that to establish that a trade mark had been forged within that section, it was necessary that the prosecution should first, establish that no assent by the proprietor had been given and, secondly, that the word had been associated by the accused on or in relation to goods in respect of which the mark had been associated in relation to trade as a trade mark. In the circumstances, the objection to registration failed. [J. D. P.]

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[8] For the opponents: *R. G. Lloyd, F. G. Guttman* (instructed by W. B. Blackwell & Co.). For the applicants: *G. D. Everington* (instructed by Faithfull, Owen & Fraser). For the Comptroller-General: *P. J. Stuart Bevan* (instructed by Solicitor, Board of Trade).

**Fraud**—*Prevention of—approval of scheme by Board of Trade*

ALLIED INVESTORS' TRUSTS *v.* BOARD OF TRADE[9] (Chancery Division: Danckwerts J.: December 14, 1955) ([1956] 2 W.L.R. 224; [1956] 1 All E.R. 162).

Proposals were made by a company for an "authorised unit trust scheme" under the Prevention of Fraud (Investments) Act, 1939. The proposals were submitted to the Board of Trade for approval, but the Board refused to approve the scheme on the ground that the proposed size of the initial service charge, which was included in the sale price of a unit, was too high. On the question whether, if the scheme provided for the matters specified in the Schedule to the Act, as required by s. 16 (1) (*c*), the Board were entitled to refuse to declare the scheme to be an authorised unit trust scheme:—

*Held,* that by s. 16 (1) (*c*) of the Act, the scheme was required to provide for the matters referred to in the Schedule "to the satisfaction" of the Board and since in the present case the Board indicated that they were not satisfied they were entitled to refuse to approve the scheme. [J. D. P.]

COMMENTARY. This case is reported because persons acting as managers or trustees under authorised unit trust schemes are exempted from the restrictions on dealing in securities imposed by section 1 of the Prevention of Fraud (Investments) Act, 1939. See Archbold, 33rd ed., 764.

**Highways**—*Noise—loudspeaker used for advertising*

REYNOLDS *v.* JOHN; T. WALL & SONS *v.* SAME[10] (Q.B. Divisional Court: Lord Goddard C.J., Stable and Ashworth JJ.: January 19, 1955) ([1956] 2 W.L.R. 398; [1956] 1 All E.R. 306).

A company operated, for the purpose of selling ice-cream, a number of vans equipped with an electrically operated mechanism for producing a sound of chimes. The driver of a van and the company were convicted of operating and causing to be operated a loudspeaker in a street of Penarth " for the purpose of advertising " contrary to s. 115 (1) of the Glamorgan County Council Act, 1952.

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[9] For the company: *S. Pascoe Hayward Q.C., Michael Wheeler* (instructed by Coward, Chance & Co.). For the Board of Trade: *Denys Buckley* (instructed by Solicitor, Board of Trade)

[10] For the defendants: *F. W. Beney Q.C., T. H. Tilling* (instructed by Simpson, North Harley & Co.) For the prosecutor: *G. R. Rougier* (instructed by Torr & Co., for Richard John, Cardiff).

*Held,* that the words " for the purpose of advertising " were not limited to denoting some form of commendation or puff, but included the prevention of persons calling attention to themselves or their wares, which they were about to sell, by means of a loudspeaker; that a " loudspeaker " within the section was an apparatus used for the purpose of reproducing sound over a wide area; on the facts both the driver and the company were guilty of an offence.

*Per* Lord Goddard C.J. *Quaere* whether an instrument need be electrically operated to be within the section. [J. D. P.]

COMMENTARY. This case will be of interest to those local authorities who have been unsuccessful in the past in curbing the nuisance caused by chimes, bells, horns, etc. The section states " (1) No person shall for the purpose of advertising any trade or business or any part of a trade or business operate or cause or suffer to be operated any loudspeaker when such loudspeaker is in any street in the county. . . . (5) In this section the expression ' loudspeaker ' includes an amplifier or similar instrument." Two points are worth noting, (1) there is no reference in the section to causing a nuisance or annoyance a phrase which has led to many prosecutions being dismissed for want of proof of nuisance or annoyance. (2) Lord Goddard C.J. preferred the use of the word " amplifier " which " would possibly be enough to include a megaphone or foghorn such as is used on a ship."

**Husband and Wife**—*Evidence.* See PARSON *v.* TOMLIN, p. 192.

**Indictment**—*Simple larceny.* See R. *v.* BRYANT (No. 2), p. 200.

**Larceny**—*Cars held under hire-purchase agreement—sale to third party*

R. *v.* ROSE [11] (Winchester Assizes: Finnemore J.: November 30–December 13, 1955).

R. was charged, *inter alia*, with larceny contrary to section 1 of the Larceny Act, 1916, and with fraudulently inducing J. to execute a valuable security with intent to defraud him, contrary to section 32 (2) of that Act. R. had taken possession of three motor-cars under a hire-purchase agreement and then, without informing the sellers, had sold the cars to third parties, who did not know of the hire-purchase agreement. With regard to the second charge, it was alleged that R. had induced J. to execute a contract in writing giving R. possession of a fish restaurant, by falsely pretending that he had money in Canada. The contract entitled R. on his payment of three post-dated cheques to immediate possession, the assignment of J.'s interest in the premises and to the goodwill of the business.

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[11] For the prosecution: *H. J. Phillimore Q.C.*, *M. McGougan* (instructed by the Director of Public Prosecutions). For the defendants: *H. J. M. Tucker, Robert Hughes* (instructed by Philip Evans & Co., Bournemouth); *G. L. Impey* (instructed by Critchley & Carpenter, Bournemouth).

*Held,* (1) that the sale by R. of the cars he held under a hire-purchase agreement could, in law, amount to larceny; (2) that the written contract he had executed with J. was a valuable security within the meaning of section 32 (2) of the Larceny Act, 1916.

R. was convicted on these and other counts and sentenced to five years' imprisonment.

[A. R. Tyrrell, *Barrister-at-Law.*]

COMMENTARY. Unless the effect of the hire-purchase agreement is to give the hirer the right to dispose of the property, section 1 (1) of the Larceny Act, 1916, specifically covers larceny by a hirer where it states: " Provided that a person may be guilty of stealing . . . notwithstanding that he has lawful possession thereof, if, being a bailee or part owner thereof, he fraudulently converts the same to his own use or the use of any person other than the owner." There appear to be few reported cases arising out of hire-purchase agreements. *R.* v. *Price* (1913) 9 Cr.App.R. 15, concerned conversion by a hirer and *R.* v. *Deller* (1952) 36 Cr.App.R. 184, showed that the hire-purchase agreement must be genuine and not just a form of security for a loan.

The definition of " valuable security " on which the second part of the decision here turns is that it includes " any scrip, debenture, bill, note, warrant, order, or other security for payment of money, or any accountable receipt, release, or discharge, or any receipt or other instrument evidencing the payment of money, or the delivery of any chattel personal, and any document of title to lands or goods. . . ."

See also p. 190, above.

### **Larceny**—*Claim of right—direction to the jury*

R. *v.* BREED [12–13] (Court of Criminal Appeal: Lord Goddard C.J., Hilbery and Stable JJ.: January 30, 1956).

B. was convicted at East Kent Quarter Sessions of stealing fixtures and sentenced to eighteen months' imprisonment. B. was a

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[12–13] For the appellant: *West Russell* (instructed by Rootes & Alliott, Folkestone). For the Crown: *Brian Clapham* (instructed by R. P. Tunstall, Maidstone).

weekly tenant of a house from which he removed two geysers, by means of which the house was supplied with hot water. He also took some lead from the roof, for which he substituted ruberoid. At the trial, B.'s defence was, with regard to the geysers, that he intended to instal immersion heaters, and, with regard to the lead, that he substituted ruberoid because the roof leaked. B. appealed to the Court of Criminal Appeal against his conviction, on the ground that the defence was not put adequately to the jury. The jury were told that B.'s defence was: "I quite honestly believed I had the right," and the concluding words of the summing-up were: "You will consider whether in fact the prosecution have satisfied you here that this man took those things—and treat each of them separately—without any claim of right and with intent to deprive the owner of them."

*Held*, dismissing the appeal, that the question for the jury was: was B. acting honestly? There was nothing mysterious in the expression "claim of right." It did not necessarily mean a claim of legal right, but it meant a claim that the accused believed to be right, and, if the accused was acting honestly, he was acting without *mens rea* and therefore without *animus furandi*. The court were of opinion that, although the summing-up might be described as somewhat sketchy, the issue of whether this man was acting honestly or not was put to the jury. [H. P.]

COMMENTARY. *R.* v. *Bernhard* [1938] 2 K.B. 264, confirms the principle that a person has a claim of right where he honestly asserts what he believes to be a lawful claim even though it is unfounded in law or fact.

See further Russell, 10th ed., 1203 *et seq*, Archbold, 33rd ed., 539, [1956] Crim.L.R. 78.

**Larceny**—*Simple larceny—indictment*

R. *v.* BRYANT (NO. 2) [PRACTICE NOTE] (Lord Goddard C.J.: January 23, 1956) ([1956] 1 W.L.R. 133).

The Lord Chief Justice made a statement about the case of *R.* v. *Bryant* [1955] Crim.L.R. 505. In that case, the Courts-Martial Appeal Court decided that, where a soldier stole military property, it was desirable to charge him under section 18 of the Army Act rather than under the common law. The judgment of the court, delivered by the Lord Chief Justice, concluded: "If the authorities do charge him under the common law, they should leave out any words relating to section 2 of the Larceny Act, 1916, and charge him, as it is proper to charge him in this country, simply with the common law offence of larceny."

The Lord Chief Justice said that the court in *R.* v. *Bryant* had pointed out that larceny was a common law offence, and that section 2 of the Larceny Act, 1916, merely dealt with punishment. That section provided a maximum of five years' imprisonment for any larceny for which no special punishment was provided. It was not improper to refer to section 2 where a simple charge of larceny was preferred; indeed, it was convenient, as it served to direct the attention of the court to the fact that the charge was not one of compound or aggravated larceny and to the punishment which the offence carried. Reference to that section did not make the indictment bad.

The court felt that any difficulty or misunderstanding would be dispelled if for the words "as it is proper to charge him in this country" in the concluding passage of the judgment, were substituted the words "as he might have been charged in this country." [H. P.]

### **Local Government**—*Disqualification for sitting as member of council—schoolmaster*

LAMB *v.* JEFFRIES [14] (Q.B. Divisional Court: Lord Goddard C.J., Stable and Ashworth JJ.: January 18, 1956) ([1956] 2 W.L.R. 366; [1956] 1 All E.R. 317).

Pursuant to a scheme of divisional administration made by the Lowestoft Town Council as divisional executive, an instrument and articles of government were drawn up relating to county secondary schools. Both under the scheme and the articles of government it was provided that the appointment of assistant masters to those schools should be made by the governors in consultation with the headmaster, and such appointments should be subject to confirmation by the divisional executive. The defendant was appointed an assistant master to a county secondary school in the borough and also acted as a member of the town council. He was charged under s. 84 of the Local Government Act, 1933, for acting as a member of the council while disqualified under s. 59 (1) (*a*) of the Act, and was convicted and fined £5 and ordered to pay £10 10s. costs. He appealed.

*Held*, dismissing the appeal and affirming [1955] Crim.L.R. 571,

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[14] For the defendant: *Michael C. Parker* (instructed by K. Wormald). For the prosecutor: *Geoffrey Rippon* (instructed by Butt & Bowyer for Daynes, Keefe & Co., Norwich).

(Stable J. dissenting) that the post of assistant master not being effective until it was confirmed by the town council, it was a "paid office . . . in the gift or disposal" of the council within s. 59 (1) (*a*), and therefore the defendant was disqualified for acting as a member and was guilty of an offence. In the circumstances, however, a nominal fine would have been an adequate penalty. [J. D. P.]

COMMENTARY. While Lord Goddard C.J. considered that the words "gift or disposal" should be widely construed, Stable J. gave them a narrower interpretation:—"The only control that the borough council had over the matter was to refuse to put forward the nominee of the governors, and that is all. So far as dismissal is concerned, a perusal of clause 19 (1) of the scheme shows that their powers were purely advisory. . . . Was this an office in the gift or disposal of the Lowestoft Borough Council? In my view, it was not. It certainly was not in their gift, and the mere fact that they had a right of veto and virtually nothing else would not, in my view, make that an office of which they had the disposal."

**Magistrates' Courts**—*Appeal from.* See BAKER *v.* WILLIAMS, p. 204, below; THOMPSON *v.* WIGLEY, p. 205, below.

**Magistrates' Courts**—*Fines exceeding maximum penalties—costs*

R. *v.* AMERSHAM JUSTICES, *ex p.* GRAHAM [15] (Q.B. Divisional Court: Lord Goddard C.J., Hilbery and Stable JJ.: January 26, 1956).

G. was charged under the railway by-laws with using obscene language in a railway carriage and interfering with the comfort of passengers. He took cross-proceedings against two other occupants of the carriage. He was fined £5 on each summons and ordered to pay £17 9s. costs. The cross-proceedings were dismissed. On an application for *certiorari* on the ground that the maximum penalty under the by-laws for each offence was 40s., it was pointed out that there was no complaint against the justices for, although a copy of the by-laws was before them, they were of such a complicated nature that the justices could be excused for not knowing the maximum penalty. It was, however, suggested that it was usual for the prosecution to state the penalty and that, as this was not done, the applicant should have the costs of the application.

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[15] For the applicant: *J. Malcolm Milne* (instructed by Walmsley & Stansbury for John D. Coulton, Amersham). For the justices: *John Wood* (instructed by Haslewood, Hare, Shirley Woolmer & Co). For British Railways: *Peter Shier* (instructed by M. H. B. Gilmour).

*Held,* quashing the conviction, that the applicant himself could have raised objection to the penalty and not having done so he should not have the costs. [J. D. P.]

**Murder**—*Intent*—*" reasonable man "*

R. *v.* WARD [16] (Court of Criminal Appeal: Lord Goddard C.J., Stable and Ashworth JJ.: January 11, 1956) ([1956] 2 W.L.R. 423).

W. was convicted at Leeds Assizes of the murder of an eighteen-month-old child and sentenced to death. The child was the daughter of the woman with whom W. was living, the father being another man. The evidence for the prosecution at the trial was that there were fractures of the skull which were not enough to cause death, and that most probably the child had been asphyxiated. W.'s case was that the child would not be quiet, and that, in a temper, he shook her. He said he had no intention of killing the child or hurting her in any way. W. appealed to the Court of Criminal Appeal against his conviction on the ground that the jury were misdirected as to the proper test for distinguishing murder and manslaughter. The direction to the jury was: " If when the person did the act he must as a reasonable man have contemplated that death or serious bodily harm was likely to result, he is guilty of murder." It was contended on behalf of W. that, except in the two exceptional cases of a killing in the course of resisting arrest or of committing a felony, the proper test was the subjective one, *i.e.,* it was not the result of the act which must be looked at, but the mind of the accused at the time of the act.

*Held,* dismissing the appeal, that the summing-up was unimpeachable. The only test which could be applied here was—What would a reasonable man contemplate? If the act was such that the jury could find that a reasonable man could say that it never occurred to him that death could result, that was not murder; but if they found that it was one which (except in cases where insanity was raised) any reasonable man must have known would cause death or grievous bodily harm, then it did amount to murder at law. Here the jury were given every opportunity to find manslaughter and, accordingly, the appeal would be dismissed. [H. P.]

COMMENTARY. The objective test has been settled for a number of years, thus in *R.* v. *Whitmarsh* (1898) 62 J.P. 711, Bigham J., stated that if the jury were of the opinion that the accused could not as a reasonable man have expected death to result, they might find a verdict of manslaughter, and a similar direction was given in *R.* v. *Lumley* (1911) 76 J.P. 208. The objective test is the one applied in the law relating to provocation and received the blessing of the House of Lords in *Bedder* v. *D.P.P.* [1954] Crim.L.R. 721. The "reasonable man" is not, however, without his critics as will be seen from the portrayal of his peculiarities in [1954] Crim.L.R. 900.

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[16] For the appellant: *R. Lyons Q.C., E. Lyons* (instructed by Hepworth and Chadwick, Leeds). For the Crown: *G. Veale Q.C., J. R. Cumming-Bruce* (instructed by the Director of Public Prosecutions).

See also Archbold, 33rd ed., 945 *et seq*; Glanville Williams, *Criminal Law,* The General Part, § 17 *et seq.; Russell,* 10th ed., 551 *et seq.*

The accused was reprieved on January 23, 1956.

### **Road Traffic**—*Dangerous driving—appeal from the justices*

BAKER *v.* WILLIAMS [17] (Q.B. Divisional Court: Lord Goddard C.J., Hilbery and Stable JJ.: January 27, 1956) (*The Times,* January 28, 1956).

The defendant was riding a motor cycle along a main road at 64 miles an hour. The traffic was heavy, but the defendant overtook and passed a car which was itself passing a moving bus, thus forming three lines of traffic. In overtaking, the defendant drove about 6 ft. over to the offside of the white line in the centre of the road. On a charge of driving at a speed which was dangerous to the public, the justices were of the opinion that having regard to all the circumstances the defendant was not driving at a dangerous speed.

*Held,* allowing the prosecutor's appeal (Stable J. dissenting), that the facts were such that only one conclusion could be drawn—that the defendant was driving in a dangerous manner, and the justices, in holding that someone must be shown to be in actual danger, had misdirected themselves. [J. D. P.]

COMMENTARY. *Bracegirdle* v. *Oxley* [1947] K.B. 349 is authority for the proposition that excessive speed alone *may* constitute dangerous driving. It was also held there that the Divisional Court will review the decisions of magistrates, not only on points of law and where there was no evidence on which they could have reached their decision, but also where in the opinion of the court their decision was perverse. In that case also Denning J. defined the distinction between primary facts and conclusions as follows:—"Primary facts are facts which are observed by the witnesses and proved by testimony; conclusions from those facts are inferences deduced by a process of reasoning from them. The determination of primary facts is always a question of fact.

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[17] For the prosecutor: *R. I. Threlfall* (instructed by Sharpe, Pritchard & Co. for A.N. Schofield, Southampton). The defendant did not appear and was not represented.

. . . The conclusions from those facts are sometimes conclusions of fact and sometimes conclusions of law. . . . The court will only interfere if the conclusion cannot reasonably be drawn from the primary facts." The application of these principles to cases of dangerous driving is not without difficulty and, it seems (see *Thompson* v. *Wigley* below) do not apply to cases of driving without due care and attention. Stable J. considered that the case raised a question of fact which was a matter for the magistrates.

**Road Traffic**—*Driving without due care and attention—appeal from justices*

THOMPSON *v.* WIGLEY [18] (Q.B. Divisional Court: Lord Goddard C.J., Stable and Ashworth JJ.: January 12, 1956) (*The Times*, January 13, 1956).

On a charge under s. 12 of the Road Traffic Act, 1930, of driving a motor-car without due care and attention, the justices, being of opinion that the defendant had exercised sufficient care in difficult circumstances to create a doubt in their minds, dismissed the information. On appeal, counsel for the prosecutor said that it was a case in which the defendant while driving a motor-van turned right across the road when there was oncoming traffic and in the circumstances, it was submitted, there was only one conclusion which the justices acting reasonably could have come to.

*Held*, dismissing the appeal, that it was only in the most exceptional circumstances that it was ever justifiable to bring up by way of case stated a finding by justices that a person was not guilty of the minor offence of driving without due care and attention. It was essentially a matter for the justices who saw the witnesses and knew the locality. The case raised a pure question of fact. [J. D. P.]

COMMENTARY. This case stresses the point made in *Gibbons* v. *Kahl* [1955] Crim.L.R. 788 that charges of driving without due care are as a general rule questions of fact for the justices. As to charges of dangerous driving see, however, *Baker* v. *Williams*, p. 204, above.

**Road Traffic**—*Evidence*. See PARSON *v.* TOMLIN, p. 192, above.

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[18] For the prosecutor: *John Stephenson* (instructed by Collyer-Bristow & Co. for P. A. Selborne Stringer, Trowbridge). The defendant did not appear and was not represented.

**Road Traffic**—*Goods vehicle—shooting brake used to carry photographic equipment*

TAYLOR *v.* THOMPSON [19] (Q.B. Divisional Court: Lord Goddard C.J., Hilbery and Stable JJ.: January 26, 1956) ([1956] 1 W.L.R. 167; [1956] 1 All E.R. 352).

The defendant, who was the owner of a Standard Vanguard shooting brake or estate car, was using the vehicle for carrying various photographic equipment in connection with the business of a company of photographic printers and free-lance photographers of which the defendant was a director. Duty had not been paid at the rate appropriate to a goods vehicle of its weight as required by s. 13 (1) of the Vehicles (Excise) Act, 1949.

*Held*, that the vehicle was a goods vehicle within s. 27 (1) of the Act of 1949, being a vehicle constructed or adapted for the conveyance of goods; that it was being used for the carriage of goods in connection with the defendant's trade or business; accordingly, it did not come within the exception provided by s. 7 (2) of the Finance Act, 1952, and, therefore, the defendant was guilty of an offence under s. 13 (1) of the Act of 1949. It was not necessary for the court to decide whether, if a doctor carried his instruments or a lawyer his legal books or robes in such a vehicle, he would be liable to pay duty appropriate to a goods vehicle.

*Per* Lord Goddard C.J. If a person has one of these vans, and he carries in it nothing except his own luggage, or his own farm produce for his own use, and nothing which has to do with his trade or business, he is committing no offence if he licenses it at the private car rate. [J. D. P.]

COMMENTARY. *Clarke* v. *Cherry* [1953] 1 W.L.R. 268, decided that in a window cleaner's van his buckets, cloths and ladders were " goods " and this case decides no more than that, when carried in the estate car of a director of a company of photographic printers, photographic equipment is " goods."

**Road Traffic**—*Third party insurance—car driven by disqualified person*

MUMFORD *v.* HARDY [20] (Q.B. Divisional Court: Lord Goddard C.J., Stable and Ashworth JJ.: January 18, 1955) ([1956] 1 W.L.R. 163; [1956] 1 All E.R. 337).

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[19] For the prosecutor: *Rodger Winn* (instructed by the Treasury Solicitor). The defendant did not appear and was not represented.

[20] For the prosecutor: *W. M. Howard* (instructed by Sharpe, Pritchard & Co. for D. Emrys Morgan, Chelmsford). The defendant did not appear and was not represented.

H. was the owner of a motor car which was insured under a policy which agreed to indemnify any person driving the car with the policy holder's permission, provided that such a person held a licence to drive and was not disqualified for holding or obtaining such a licence. On two occasions H.'s son, who was under age for obtaining a licence, but who had obtained one by falsely stating his age, drove the car. The son was charged under section 35 (1) of the Road Traffic Act, 1930, with using the car without a third party insurance and the father was charged with permitting such use. At the hearing the representative of the insurance company said that the company would have considered itself liable if an accident had happened because of the decision in *Edwards* v. *Griffiths* [1953] 1 W.L.R. 1199. Both the defendants were acquitted. On appeal by the police:—

*Held*, allowing the appeal and distinguishing *Edwards* v. *Griffiths,* that in view of the provisions of s. 7 (1) and (4) and s. 9 (5) of the Act of 1930, the son was disqualified from holding a licence; accordingly, the car was not covered for third party risks and both the son and father were guilty of an offence under section 35 (1). [J. D. P.]

COMMENTARY. Section 7 (1) of the Road Traffic Act, 1930, provides for the suspension of the licence of a person disqualified by virtue of a conviction or order; subsection (4) makes it an offence " If any person who under the provisions of [Part I] of this Act is disqualified for holding or obtaining a licence . . . while he is so disqualified drives a motor vehicle. . . ." Section 9, which is in Part I of the Act, prohibits a person under seventeen years of age from driving and, by subsection (5), such a person is deemed to be disqualified under the provisions of Part I of the Act. The decision in *Edwards* v. *Griffiths* [1953] 1 W.L.R. 1199, considered the meaning of the words " disqualified for holding or obtaining . . . a licence " and it was held that as between assured and insurers they meant disqualified from holding or obtaining a licence by an order of a court and did not mean prohibited from holding or obtaining a licence by reason of mental or physical disability. The effect of *Edwards* v. *Griffiths* is therefore limited to its special facts and does not apply where, as here, there was a disqualification imposed by the Act.

**Road Traffic**—*Traffic lights—evidence that light was working properly*

WELLS *v.* WOODWARD [21] (Q.B., Divisional Court: Lord Goddard C.J., Stable and Ashworth JJ.: January 19, 1956).

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[21] For the appellant: *Michael Hoare* (instructed by Doyle, Devonshire & Co., for Dennis Berry & Co., Reading).

W. was charged with dangerous driving. The justices found that W. drove a motor coach downhill in a northerly direction across cross-roads controlled by traffic lights. At the same time, other traffic, including a van, was lawfully passing over the crossing from east to west and vice versa. W.'s coach collided with and damaged the van. At the time when the van moved on to the crossing the relevant traffic signals controlling the traffic from east to west showed green and from that the justices inferred that when the coach moved on to the crossing the relevant traffic signal showed red against W. The justices were of the opinion that in the absence of evidence to the contrary they were entitled to assume that the traffic lights were working properly and that the light controlling W.'s coach was showing red; accordingly, they found that the unexplained action of W., having regard to all the circumstances, was dangerous driving. W. appealed on the ground that there was no evidence to show that the light was red against him.

*Held*, that if the justices were satisfied that one light was showing green the inference could be drawn, unless the contrary was proved, that the other light was red.

[Miss C. J. Ellis, *Barrister-at-Law*.]

COMMENTARY. There appears to be no decision of the High Court exactly on the point raised in this case, although in *Nicholas* v. *Penny* [1950] 2 K.B. 466, it was held that if a mechanical device, such as a watch or speedometer records a particular time or speed, that is *prima facie* evidence of that time or speed, notwithstanding that no evidence is adduced as to the accuracy of the device.

The point has frequently been raised in the magistrates' courts, sometimes with success, and it is interesting to note that Mr. Sutterthwick (see [1954] Crim.L.R. 776) is now supported by authority.

**Sentence**—*Borstal training—boy released from detention centre*

R. *v*. GOODING [22] (Court of Criminal Appeal: Lord Goddard C.J., Pearce and Pearson JJ.: October 31, 1955).

In October, 1954, G. was put on probation at Essex Quarter Sessions for offences of housebreaking and shopbreaking. In June, 1955, he committed an offence of larceny and was sentenced for this offence at Stretford Magistrates' Court to three months' detention in a detention centre. On his release from the detention centre, G. was brought back to Essex Quarter Sessions in October, 1955, and was sentenced for the original offences to a term of

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[22] The appellant did not appear and was not represented. The Crown was not represented.

Borstal training. He appealed to the Court of Criminal Appeal against his sentence.

*Held,* allowing the appeal, the sentence of three months' detention was a very good way to deal with G., as the discipline at detention centres was very strict. But it was not right, save in a most exceptional case, that a sentence of Borstal training should be passed on a young offender who had just been released from a detention centre, if the offence for which he was being sent to Borstal was committed before the offence for which he had been sent to the detention centre. In all the circumstances, the court would set aside the sentence of Borstal training and release the appellant. [H. P.]

**Sentence**—*Corrective training—carnal knowledge*

R. *v.* KING[23] (Court of Criminal Appeal: Lord Goddard C.J., Hilbery and Stable JJ.: January 30, 1956).

K., who was 28 years of age, was convicted at the Central Criminal Court of two offences of carnal knowledge of a girl under 16, and was sentenced to four years' corrective training. K. appealed to the Court of Criminal Appeal against his sentence.

*Held,* that four years' corrective training was not an appropriate sentence for this class of offence, for which the maximum sentence provided by Parliament was two years' imprisonment. Corrective training was generally imposed on young thieves and burglars and people who needed to be taught how to earn an honest living. Accordingly, the sentence of four years' corrective training would be set aside and one of eighteen months' imprisonment substituted. [H. P.]

**Sentence**—*Preventive detention—cases where imprisonment should be imposed*

R. *v.* WALLS[24] (Court of Criminal Appeal: Lord Goddard C.J., Stable and Ashworth JJ.: January 11, 1956).

W. pleaded guilty at Oxfordshire County Sessions to four offences of housebreaking and an assault on the police, and, sixteen other offences being taken into consideration, was sentenced to eight years' preventive detention. W. was thirty-one years of age and had twelve previous convictions. He applied to the Court of Criminal Appeal for leave to appeal against his sentence.

*Held,* that preventive detention ought not to be imposed where the appropriate sentence would be the same length of imprisonment. The object of preventive detention was to enable courts to pass a longer sentence than they otherwise would because it was necessary, having regard to the character of the man, to protect the public from him for a long time. In this case a sentence of eight years' imprisonment would not have been too long and the court could see no reason why preventive detention should have been imposed rather than imprisonment. The sentence would, therefore, be varied from eight years' preventive detention to eight years' imprisonment. [H. P.]

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[23] The appellant appeared in person. The Crown was not represented.

[24] The applicant did not appear and was not represented. The Crown was not represented.

**Sentence**—*Preventive detention—maximum sentence*

R. *v.* MANGHAM [25] (Court of Criminal Appeal: Lord Goddard C.J., Hilbery and Stable JJ.: January 30, 1956) (*The Times*, January 31, 1956).

M. was convicted at Nottingham Assizes of assaults on railway police officers while attempting to rob a train, and sentenced to fourteen years' preventive detention. M. was forty-two years of age and had a long criminal record, including sixty-three summary convictions and convictions for unlawful wounding, raiding trains and receiving. The longest sentence he had received was three years. He appealed to the Court of Criminal Appeal against his sentence.

*Held,* that this was obviously a case for preventive detention, as M. was evidently a very desperate character, but it was not a case in which to impose the maximum sentence, as M. had never before had a longer sentence than three years. The sentence would, therefore, be reduced to one of 12 years' preventive detention. [H. P.]

**Shopbreaking**—*Evidence—civil trespass*

R. *v.* AYRES [26] (Court of Criminal Appeal: Lord Goddard C.J., Hallett and Pearson JJ.: December 5, 1955) (*The Times*, December 6, 1955).

A., who was seventeen years of age, was convicted with two others at London Sessions of breaking and entering a shop and stealing therein twelve ice creams and two bottles of mineral water; she was sentenced to two years' probation. A. applied to the Court of Criminal Appeal for leave to appeal against her conviction on the main ground that there was no case to go to the jury. Although she had acted unlawfully in getting into the premises adjoining the shop; A. had only committed a civil trespass and there was no evidence of breaking although she might have accepted an ice cream.

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[25] The appellant appeared in person. The Crown was not represented.

[26] For the applicant: *J. B. Frankenburg* (instructed by Anthony Leader & Co.). The Crown was not represented.

*Held*, that the application should be treated as an appeal and the conviction quashed. The chairman should have pointed out that going on to property was only a civil wrong and that there was no evidence of shopbreaking. [H. P.]

COMMENTARY. This report replaces that at [1956] Crim.L.R. 129.

**Trial**—*Larceny*. See R. *v*. BREED, p. 199, above.

# *Acts and Orders*

### Agriculture

POULTRY PREMISES AND VEHICLES (DISINFECTION) ORDER, 1956 (S.I. No. 11): operative January 12, 1956. In order to prevent the spread of disease, an inspector of the Minister of Agriculture, Fisheries and Food or of a local authority may serve a notice on certain persons requiring them to clean and disinfect slaughterhouses, premises, stalls, vehicles or equipment within the time and in the manner prescribed in the notice. The persons upon whom such notices may be served are: the occupier of any slaughterhouse or of any premises or stall used for the temporary keeping or detention of live or dead poultry or of feathers collected from poultry; the owner or the person in charge of any vehicle used for the conveyance or exposure for sale of live or dead poultry or of feathers collected from poultry; the owner or person in charge of any equipment used for or about live or dead poultry or of feathers collected from poultry in any slaughterhouse, premises, stall or vehicle. Premises required to be cleaned and disinfected may not be used for the reception of any more poultry, live or dead, or feathers until the work has been done. If a notice is not complied with a person authorised by the Minister or local authority may carry out the work, the cost of which will be recoverable as a debt due to the Crown or to the local authority. It is an offence to contravene or to fail to comply with a notice, the penalties for which are provided by section 79 of the Diseases of Animals Act, 1950.

The provisions of the Order are in addition to the provisions of the Poultry Pens, Fittings and Receptacles (Disinfection) Order, 1952 (S.I. No. 437).

### Animals

See SLAUGHTER OF ANIMALS (PREVENTION OF CRUELTY) (SCOTLAND) REGULATIONS, below.

### Birds

WILD BIRDS (OYSTER-CATCHERS) ORDER, 1956 (S.I. No. 25): operative January 16, 1956. In parts of Lancaster and Westmorland specified in the schedule to the Order, the oyster-catcher is added to the list of birds to which Schedule II of the Protection of Birds Act, 1954 ([1954] Crim.L.R. 638), applies. Such birds may be killed or taken and their nests destroyed only by authorised persons.

### London

The following Orders have been made detailing prescribed routes: S.I. 1956, Nos. 22 (Lambeth); 28 (Tottenham).

The following Order has been made altering the streets in which the sale of goods from vehicles, waiting, loading and unloading, are restricted: S.I. 1955, No. 1985.

### Road Traffic

ROAD VEHICLES LIGHTING (AMENDMENT) REGULATIONS, 1955 (S.I. No. 1984): operative January 12, 1956. The requirements of the Regulations of 1954 (S.I. No. 1105; [1954] Crim.L.R. 767) relating to the position of reflectors and rear red lights on vehicles are varied in the case of works trucks and works trailers. Works trucks and trailers are defined as those designed for use in private premises and used on a road only in passing from one part of such premises to another or to other private premises in the immediate neighbourhood; this definition does not include a motor-vehicle constructed to straddle and lift its load for the purpose of transportation.

### Scotland

*Animals*

SLAUGHTER OF ANIMALS (PREVENTION OF CRUELTY) (SCOTLAND) REGULATIONS, 1955 (S.I. No. 1993): operative July 1, 1956. Provision similar to that contained in the English Regulations (S.I. 1954, No. 1584; [1955] Crim.L.R. 46), is made concerning the construction and equipment of slaughterhouses and knackers' yards, the confinement and treatment of animals awaiting slaughter, the slaughter of animals and the notices, records and returns of slaughterhouses and knackers' yards. As in the English Regulations there are special requirements concerning knackers' yards and horses.

The penalties for contravention of the regulations are a maximum fine of £100 or imprisonment for not more than six months or both.

A licence granted by a local authority under section 2 of the Slaughter of Animals (Scotland) Act, 1928, otherwise than by way of renewal of an existing licence, may be subject to a condition that the holder shall not slaughter any animal except under supervision. Such a condition may not be imposed where a person has been employed as a slaughterman for at least one year and has satisfied a local authority of his ability to slaughter animals with the infliction of as little pain and suffering as possible.

# *Letters to the Editor*

### The Power to Prosecute

Sir,

I have read with interest the above articles by Dr. Glanville Williams appearing in the October and November editions of the *Criminal Law Review,* 1955, especially that part referring to police prosecutions.

It has been the practice in this county for many years for a senior police officer to prosecute simple cases sent for trial, mainly on the grounds of economy. In those circumstances, the clerk to the committing justices would then brief counsel, for which he was paid a fee by the county treasurer. I understand that such procedure is still fairly common in many magistrates' courts throughout the country.

However, an opinion was expressed some time ago that it was irregular for a police officer or any informant not being a solicitor or barrister to examine or cross-examine witnesses when depositions are taken. This view was based on Hayward & Wright's *Office of Magistrate* which puts the matter as follows:

> "*Informant may not conduct prosecution*—The informant may not conduct the case as he can upon a summary charge, as theoretically the prosecution is directly by the Crown, but a Barrister or Solicitor has the fullest right of advocacy on behalf of the prosecution for technically the client is the Crown and not the individual. In an indictable case, it is thus irregular for a chief constable or other police officer to make an opening statement or to examine or cross-examine witnesses or otherwise to act as an unqualified advocate."

Further, it was pointed out that the editor makes a bold statement in his preface that no statement of law has been made which is not supported by authority.

In conflict with this view is that quoted in Stephen's *Commentaries on the Law of England*, 21st edition (1951) Vol. IV, Chapter 15, p. 237, which specifically deals with indictable cases before the examining justices.

> "*The Hearing*—The accused person must be present throughout the whole examination, which need not be, but generally is, in open

> court. Both the prosecutor and the accused have the right to be represented by counsel or solicitor, though each may conduct his own case if necessary, and counsel or solicitor representing the prosecutor may, if the examining justices think fit, make an opening speech, giving the outline of the case. Each party has the right to call witnesses on his own behalf and to cross-examine the witnesses called by the other side."

The Report of the Departmental Committee on Justices' Clerks (usually known as the Roche Report) urged that the police should avail themselves more often of legal representation. However, although they dealt with this point and were against the police acting as prosecutors, they did not find that it was irregular for them to do so, and therefore one must presume that they could find no authority to forbid the practice, otherwise they would have readily done so.

It is clear that no provision is made in the Indictable Offences Act, 1848, which entitles an informant to conduct a case for the prosecution, and it appears that the position has not been defined by statute. We are therefore thrown back on the common law position, which one school of thought here believes to be, that in a prosecution, whether brought by a private person or someone in an official capacity, once the case is treated as indictable it becomes a prosecution on behalf of the Crown, so that if an Inspector of Police lays an information which can be, and is, dealt with summarily, the case is "*Inspector* v. *Defendant*," but if it is to be dealt with on indictment it becomes "*The Queen* v. *Defendant*," and then only solicitors and barristers have a right of audience. Included in the latter is that of examining and cross-examining witnesses at committal.

The other school of thought contend that should this view be correct then the many opponents to the practice of police acting as advocates, would have promptly been upheld by the Law Officers of the Crown and they would have caused Chief Officers of Police to discontinue the practice because of its irregularity. I would add that it is now the practice in this county to engage a solicitor for all cases which must go for trial, but there are occasions when the prosecution anticipate a case being dealt with summarily, and the defendant exercises his right and asks for trial by jury. In these cases, it would be expedient and in the interests of witnesses etc., for the police to carry on with the committal, instead of adjourning for the purpose of engaging a solicitor, as is now the rule to accord with Hayward & Wright.

This matter has caused much discussion amongst colleagues, and it was hoped that Dr. Williams, in his articles, might have made some direct reference to the point, but he did not do so.

I should be most grateful, therefore, if you would comment on the matter, or alternatively, take it up with Dr. Williams.

Yours faithfully,

R. G. KENDLE,

Det. Sergeant.

*Ross-on-Wye*

[Dr. Glanville Williams has written a short article considering the points here raised which we publish at p. 169.—EDS.]

# Books and Periodicals

**Reviews:**

*Current Legal Problems, 1955.* Edited by George W. Keeton and Georg Schwarzenberger. London: Stevens & Sons, Ltd. 1955. vii and 235 and (tables and index) 12 pp. (32s. 6d.)

To the criminal lawyer, the principal item of interest in this annual series of lectures given at University College, London, is a striking essay by Professor Glanville Williams on "The definition of crime." He rightly describes it as one of the thorny intellectual problems of the law and, for some readers perhaps, the interest aroused by the title of the essay may be diminished by the realisation that much of the discussion is centred around the semantic niceties and weaknesses of the traditional and more modern definitions of crime. And yet it is by the pursuance of this very form of analysis that the author contrives to do something more than merely illuminate the pitfalls which ensue from adopting the popular or criminological meanings of crime, restricted as they are to the very small proportion of offences involving some form of dishonesty or violence. Attempts are made to concentrate on the physical, economic or social consequences of crime, but such definitions are eschewed in favour of the innocuous but safe definition based upon the peculiar characteristics of the legal proceedings which follow the commission and apprehension of the offender.

To my mind, however, the greater attraction of this essay lies in the author's occasional digressions into questions of law reform. Amongst these may be mentioned the suggestion that for statutory offences involving no question of *mens rea* there should be introduced, instead of the existing alternatives of fine or imprisonment, a form of proceeding whereby the court could issue a mandatory injunction compelling the defendant to perform his statutory obligations. However radical it may sound at first, this additional form of sanction merits further examination. Then there is the plea, so often heard but with such little hope of realisation, for the re-classification of crimes in terms of social or moral gravity. This is no easy task and any such re-classification would need constant revision for, as pointed out by the author in another connection, conduct which is regarded as morally reprehensible in one era and made criminal by legislative enactment continues to be a crime long after the climate of public opinion has changed.

With such welcome readiness to interlace semantic analysis with the advocacy of measures of reform, it is disappointing to note Professor Williams's hesitancy to do more than criticise those other writers who have maintained that moral culpability is an essential element in the definition of crime. Of course, crimes of strict liability are the glaring exception to such a theory, with the further parallel, drawn from the higher realms of crime, of mercy-killings and eugenic abortions. The latter, the author contentiously maintains, though indisputably crimes are but disputably moral wrongs. In a short essay of this kind it is expecting too much of a writer to expand his views on all the controversial aspects of his subject. But it is urged that the need is not to acquiesce in the realities of the present situation, so much as to plead, both from the legislature and the courts, for a closer assimilation between criminal responsibility and moral wrongdoing.

J. Ll. J. Edwards.

**Books Received:**

*Famous Criminal Cases* (2). By Rupert Furneaux. London: Allan Wingate. 1955. xiv and 197 pp. (12s. 6d. net.)

*Summons Headings Useful to Police.* Twenty-third edition. By J. Hopker. London: Police Review Publishing Co., Ltd. 1955. 176 pp. (2s. 4d. net.)

*Famous European Crimes.* By David Rowan. London: Frederick Muller, Ltd. 190 pp. (12s. 6d. net.)

*The Cinematograph Regulations*, 1955. By Leslie Knopp, M.B.E. London: The Cinema Press, Ltd. 1955. 134 and (appendices and index) 51 pp. (21s. net.)

**Reader's Digest:**

The following abbreviations are used in the Reader's Digest:

L.Q.R. : Law Quarterly Review
M.L.R. : Modern Law Review
S.J. : Solicitors' Journal
L.J. : Law Journal
L.T. : Law Times
J.P.J. : Justice of the Peace Journal

*Embezzlement and the disobedient servant*: *R.* v. *Davenport* [1954] Crim.L.R. 383 raises doubt as to whether a servant can embezzle property which he has received contrary to the express or implied instructions of his master. J. C. Smith seeks to prove that he can: 19 M.L.R. 39.

*Election for trial by jury and committal for sentence*: The provisions relating to these matters are set out in some detail at 100 S.J. 40.

*Bail and bad character*: It is pointed out that the presumption that a man is innocent until he is proved guilty does not apply when granting bail; then his known character must be considered: 116 L.J. 22.

*Character of surety*: F. G. Hails argues that justices have power to inquire into the character of a surety before granting bail: *Police Review*, January 20, 1955, p. 47.

*Dangerous and careless driving*: Attention is drawn to some of the arguments against trying two or more defendants jointly on charges under section 11 or section 12 of the Road Traffic Act, 1930: 120 J.P.J. 38.

*Vehicle registration plates*: Must motor-cars carry registration plates on roads which are not highways repairable by the inhabitants at large? This is considered at 120 J.P.J. 54.

*Protecting the nation's larder*: The recent amendment and consolidation of the food and drugs legislation is considered and its effect briefly noted: 100 S.J. 4.

*International Criminal Police Review*: The December, 1955, issue of this journal contains a detailed report of the proceedings at the General Assembly of the International Criminal Police Commission held at Istanbul last September.

THE

CRIMINAL LAW

REVIEW

*Editors*

JOHN BURKE and PETER ALLSOP, M.A.

*Barristers-at-Law*

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# *Editorial*

## Prostitution

What is meant by the words "knowingly living wholly or in part on the earnings of prostitution"? Recently at the Central Criminal Court [1] the landlords of some Soho flats and estate agents were charged with this offence. It was alleged that the former were landlords of flats which would normally carry a rent of £3 to £5 a week, but which were let to prostitutes at rents as high as £25 a week; in addition the women had to pay £200 key money. The other defendants were concerned in running an estate agency which the prosecution alleged dealt with virtually nothing but providing and letting flats to prostitutes. From the twenty-four flats concerned in the case it was alleged that rents totalling £26,000 a year were paid by the women.

Judge Maude Q.C. directed the jury to return verdicts of Not Guilty. He held that within the law as it stands at present there was no case for the defendants to answer. If the words of section 1 of the Vagrancy Act, 1898, were strictly interpreted it would seem that anybody who received money earned by a prostitute would be committing an offence; for instance persons supplying her with goods or a doctor who attends her or a lawyer who appears for her. Such a result could not be the intention of the Act and it had been suggested that the persons supplying the goods, the doctor and the lawyer were in fact living on their own earnings, not those of the prostitute. Judge Maude did not think the position of the defendants in the present case could be distinguished.

During the course of his judgment Judge Maude remarked that the problem might warrant some action by Parliament, but answering questions in the House raised by this case the Home Secretary said that the case was being considered by the Departmental Committee on Homosexuality and Prostitution and he thought it would be wise to await its report before considering legislation.[2]

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[1] See *The Times,* February 10, 1956.

The Commissioner of Police estimates the number of prostitutes operating in the West End at about 780.[3]

### Capital punishment

The Government are not to introduce their own Bill for the abolition of capital punishment as it would not in their view be appropriate for they themselves to bring forward a measure which they so recently advised the House of Commons against. Instead they have decided to allow time for the Private Member's Bill introduced by Mr. S. Silverman. At each stage there will be a free vote. The committee stage will be taken on the floor of the House.[4]

The Home Secretary and Secretary of State for Scotland have considered what course they ought to adopt in considering future cases where persons are sentenced to death. Each case will be considered on its merits and regard had to " all relevant considerations of either a public or private nature." [5]

A number of questions have been asked in the Commons as a result of the debate on capital punishment. The Colonial Secretary replied to a question about the operation of the death penalty in colonies, that local law and practice are the responsibility of the colonial governments. The Home Secretary informed the House that there are at present six persons officially qualified to perform the duties of executioner and assistant executioner and he gave details concerning their recruitment, training and terms of service.[6]

The Prison Officers' Association expressed disquiet at the proposed abolition of the death penalty in a letter to the Home Secretary, pointing out that no consideration appears to have been given to the fact that a convicted murderer may, in the early stages of his sentence, commit a further murder of either a fellow prisoner or a member of the prison staff without altering in any material way the sentence which he has to serve. They suggested that where a second murder is committed by a person serving a sentence for murder his position shall be catered for under special legislation and that the Civil Service Superannuation Act, 1949, be amended so as to provide for special provision for the widows or dependants of prison officers who may be killed as a result of an attack by a prisoner. The Home Secretary has replied promising to bear in mind the points they have made.[7]

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[2] H.C. Debates, Vol. 549, col. 557; February 23, 1956.

[3] Vol. 549, col. *59*; February 23, 1956.

[4] H.C. Debates, Vol. 549, col. 578; February 23, 1956.

[5] Vol. 549, col. 585; February 23, 1956.

[6] Vol. 549, col. *41*; February 22, 1956: col. 561; February 23, 1956.

### Riding a pedal cycle recklessly

Is it a common law offence to ride a bicycle recklessly? This is a question which the High Court of Justiciary had to consider in *Quinn* v. *Cunningham*, 1956 S.L.T. 55. A complaint had been laid against Quinn that he " did ride a pedal cycle in a reckless manner and did cause it to collide with and knock down " another person, both of them sustaining injury. Quinn objected to the complaint on the ground that it disclosed no offence in Scottish law and his objection was upheld. The complaint did not show the degree of recklessness necessary to constitute a crime at common law; such recklessness must be " so high as to involve an indifference to the consequences for the public generally."

The Road Traffic Bill now before Parliament contains a clause applying section 11 (1) of the Road Traffic Act, 1930, which penalises reckless driving and section 12 (1), which penalises careless driving, to pedal cyclists.

### Juvenile witnesses

The Home Office has issued a circular concerning the publication of particulars of juvenile witnesses in proceedings arising out of an offence against or any conduct contrary to decency or morality, which we publish in full at p. 250.

### Parliament

#### *Identity*

The Home Secretary rejected a suggestion that rules should be drafted for use in the Metropolitan Police area in cases where conviction depends upon identification to ensure that safeguards exist against the possibility of mistaken identification. He considers that the existing instructions issued by the Commissioner of Police provide all possible safeguards (H.C. Debates, Vol. 548, col. *209*; February 9, 1956).

#### *Transcripts of evidence*

The Home Secretary is considering whether it may be desirable to amend the law in order to put it beyond doubt that transcripts of evidence taken under section 16 of the Criminal Appeal Act, 1907, can be made available to Parliament and placed in the library of the House of Commons. If so he hopes it will be possible to introduce the necessary legislation and he will consider whether such legislation should be made retrospective (Vol. 548, col. 2534; February 16, 1956).

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[7] Vol. 549, col. 1346; March 1, 1956.

*Children and young persons*

The Home Secretary proposes to set up a committee to consider, among other matters, the working of the provisions of the Children and Young Persons Act, 1933, concerning juvenile courts and the treatment of children coming before them. The membership and exact terms of reference of the committee will be announced in due course, but its terms of reference will include consideration of the powers and duties of local authorities under the Children Act for preventing the suffering of children neglected in their own homes. In order that interested organisations may have time to consider what evidence to submit to the committee the Home Secretary contemplates that it should start work in the autumn (Vol. 548, col. *133*; February 2, 1956).

*Slaughter of animals*

It has been suggested that the Slaughter of Animals (Prevention of Cruelty) (No. 2) Regulations, 1954, are obscurely drafted in not making it clear whether the police or the local authorities are enabled to institute proceedings in cases arising under them. The answer is that anybody may institute such proceedings and the responsibility for enforcement does not rest on the police (Vol. 548, col. *204*; February 9, 1956).

*Parking without lights*

Under the Road Vehicles Lighting (Standing Vehicles) (Exemption) (London) Regulations, 1955 (see [1955] Crim.L.R. 656) commercial vehicles of under two tons unladen weight are permitted to park without lights in London subject to certain conditions. The Metropolitan Police have instructions to ensure that vehicles are not left without lights except in accordance with the Regulations (Vol. 548, col. 2532; February 16, 1956).

The Home Secretary intends shortly to make regulations, promised some months ago, enabling vehicles outside the London area to be parked without lights where the chief officer of police consents to it (Vol. 549, col. *47*; February 22, 1956).

### *Drugs*

The Home Secretary is satisfied that the present arrangements for suppressing illicit traffic in drugs are adequate. He does not propose to introduce heavier penalties than those at present existing, the maximum penalty under the Dangerous Drugs Act, 1951, on conviction on indictment being a fine of £1,000 or ten years' imprisonment or both (Vol. 548, col. 2530; February 16, 1956).

### *Remand and detention centres*

Owing to the present need to restrict expenditure on Government building the Home Secretary cannot say when it will be possible to open the remand centres for children and young persons up to the age of twenty-one provided for in section 48 of the Criminal Justice Act, 1948. At present there is no detention centre serving north-east England, but provision for the acquisition of premises suitable for adaptation as such has been included in the 1956–1957 estimate (Vol. 548, col. *132*; February 2, 1956).

## Judicial Appointment

Major John Fitzgerald Marnan, M.B.E., Q.C., has been appointed a Metropolitan Magistrate.

*Subscribers and others are invited to submit for publication articles and letters on matters of interest within the scope of this Review. They should be sent to the* EDITOR, *Criminal Law Review*, 3 CHANCERY LANE, LONDON, W.C.2. *Every effort will be made to return drafts or unsuitable copy, but no guarantee can be given in this respect.*

*Books for review should be sent to the Publishers at the above address.*

# *Discretion in Prosecuting*

By Glanville Williams, ll.d., *Barrister-at-Law*

It is completely wrong to suppose (as is sometimes done) that the institution of prosecutions is an automatic or mechanical matter. This is, indeed, the theory in some Continental countries, such as Germany, where the rule is that the public prosecutor must take proceedings for all crimes that come to his notice for which there is sufficient evidence, unless they fall within an exception for petty offences, in respect of which he is given a discretion. In England, however, there is discretion in prosecuting in respect of all crimes. That this is and must be so with truly private prosecutions needs no demonstration: no private citizen supposes that he must prosecute for every technical offence brought to his notice, even though he is the direct victim of it. But it is equally true of public prosecutions. As Sir Hartley Shawcross said, when Attorney-General, in the House of Commons: "The truth is that the exercise of a discretion in a quasi-judicial way as to whether or when I must take steps to enforce the criminal law is exactly one of the duties of the office of the Attorney-General, as it is of the office of the Director of Public Prosecutions. It has never been the rule in this country—I hope it never will be—that suspected criminal offences must automatically be the subject of prosecution. The public interest . . . is the dominant consideration." See H.C. Debates, Vol. 483, col. 681, January 29, 1951.

### *Principles upon which discretion is exercised*

Since enforcement authorities do not prosecute in all crimes that come to their notice, their exercise of discretion in deciding whether or not to prosecute constitutes a factor of great importance in the administration of the criminal law. The first question to be decided is whether there is sufficient evidence to warrant a prosecution; but it is also important to consider whether the prosecution is likely to succeed, because it is bad for the administration of justice if many prosecutions are undertaken when there is no reasonable hope of obtaining a conviction. Sometimes, however, there may be special reasons for launching what is legally a weak case, when the defendant is morally guilty and the legal point is an arguable one.

Then, thirdly, there is the question of public interest. As the Director of Public Prosecutions, Sir Theobald Mathew, has said, this does not mean private interest, however extensive or important that private interest may be (*The Department of the Director of Public Prosecutions* (Law Society, London, 1952)). For example, it is no argument against prosecuting, say, a solicitor that the result of the prosecution may be to shake public confidence in solicitors. The law can be no respecter of persons or of bodies of persons. Still less do political factors come in: we have been fortunate in keeping politics out of the administration of justice in this country. However, some proper considerations of public interest arise. One consideration is the effect that the prosecution may have upon public morale and order. It may even be decided not to prosecute because of the risk that the defendant may be enabled to pose as a martyr: thus no prosecution was undertaken for the theft of the Stone of Scone in 1951. Then there are considerations of justice and mercy: it may be thought that the wrongdoer has already suffered enough, or perhaps he is too ill to stand his trial without great risk to his health. All these matters have been mentioned by Sir Hartley Shawcross as governing his judgment when he held the office of Attorney-General (*The Office of the Attorney-General* (Law Society, London, 1953)). They are also taken into account by the police. Sir Leonard Dunning expressed the point well when he said that "successful prosecution is not in itself the end to be sought, but is one of the means to secure the real purpose of the police service, the prevention of crime" ((1928) 1 *Police Journal* 47).

The existence of discretion in prosecuting in England, as compared with a country like Germany, may be justified in part by the survival of private prosecutions. If the Attorney-General or the police refuse to take action at the instance of the victim of an alleged crime, the victim is still at liberty to do so himself. But this justification is largely a theoretical one, because it would be rare for a private person to prosecute if the police for one reason or another think that the case is not suitable for prosecution.

Another possible argument in favour of the discretion is that the offender is sometimes a rather harmless person whom it would be unjust or unduly harsh to punish. To this, again, there is a partial reply: criminal courts now have almost complete power to discharge offenders without punishment. The fact that a prosecution is brought does not mean that the defendant will be made to suffer. But it is true that the publicity and humiliation of proceedings and the cost of having to defend them may themselves be a punishment which it is not thought necessary to inflict. Also, if the case is really to have no outcome it is a waste of public time and money to prosecute, besides creating unnecessary social tensions.

For these reasons, in trivial offences, the police will often content themselves with giving a warning, particularly where the offence is a technical one. This use of discretion has received judicial approval, because it has been said that even where the law imposes strict responsibility, " it is important that only those should be charged who either deserve punishment or in whose case it can be said that punishment would tend to induce them to keep themselves and their organisation up to the mark " (*James & Son Ltd.* v. *Smee* [1955] 1 Q.B. 78 at 93). Consequently, judges have uttered criticisms where prosecutions have been started on technical grounds without substantial merit (*e.g.*, in *Shields* v. *Little,* 1954 S.L.T. 146).

### *Obsolete and controversial legislation*

But the exercise of discretion by the police goes beyond this. There are some laws that remain on the Statute-book through governmental inertia, which could not be enforced without offence to public opinion. Examples are the old Acts against apostasy and profane swearing. Similarly, the police do not prosecute for attempted suicide, unless the culprit has refused to put himself under the care of people who will look after him. They do not normally proceed against a woman who commits abortion upon herself, but prosecute only those men and women who act as professional abortionists—the " back street surgeons." One good reason for not prosecuting the mother is that her evidence is required against the professional abortionist, who through his unskilled ministrations is the real mischief. Even though the mother has operated upon herself, or taken drugs without the intervention of another, she will frequently cause herself such injury as to necessitate medical attention, and it would be most undesirable that she should be deterred from seeking this attention through the threat of punishment. Yet another reason for not prosecuting her is the difficulty of persuading a jury to convict the mother for what many regard as an imaginary crime, and the unlikelihood that even if convicted she will receive anything but an immediate discharge. Whatever the reason behind it, and however humanly understandable or indeed laudable the reason may be, the fact is that the practice of not charging the mother amounts to a virtual repeal of the first part of section 58 of the Offences against the Person Act, 1861, which makes abortion by the woman herself a serious crime. Where a law is so much out of accord with public opinion that the police do not prosecute under it, one would expect an active legislature to repeal the law, for its existence is always a possible source of anomaly and injustice in individual cases.[1] Also, it is a matter of acute embarrassment to the police to have to decide whether and how far to enforce repressive and unpopular legislation of doubtful policy, such as the law against lotteries and street betting. If they determine not to prosecute in a particular class of case, they are open to the charge of assuming the function of Parliament. Perhaps it is a fair reply that the police are compelled to assume the function of Parliament when Parliament does not properly discharge it. In discussing the particular subject of street betting, the Royal Commission on Police Powers and Procedure said that " the present state of the law is altogether anomalous, and so out of harmony with public opinion, that attempts to enforce it are bound to react on the morale of the police " (Cmd. 3297 of 1929, p. 80).

Sir Theobald Mathew has indicated another important consideration: whether the offence comes within the real vice at which a particular section of the Act of Parliament is aimed, because to use Acts of Parliament in cases which they were not intended to cover would be apt to bring the administration of justice into contempt. One illustration he gives is as follows: " The law relating to the offence of carnal knowledge is intended to protect innocent girls from corruption by vicious men ; it is not intended to make criminals out of respectable young couples who are courting, often with the approval of their parents, and fall to what is one of the strongest and most natural of temptations, or to punish otherwise decent young men who are picked up by girls who are acting in effect as prostitutes." Another illustration is bigamy. " The purpose in making bigamy an offence is not to punish errant husbands, nor to ensure the accuracy of the Registrar-General's records, nor to assist the legal wife to obtain the necessary evidence for a divorce. The serious element in the offence of bigamy, as the Court of Criminal Appeal has pointed out, is the seduction of the bigamous wife by going through the form of marriage. Therefore, in cases in which the bigamous wife is making no complaint and, as frequently happens, was not deceived, and there is no other vicious element, I frequently advise that the interests of justice do not require a prosecution. I am supported in this view by the number of cases in which a nominal penalty is imposed in such circumstances." Whether or not this truly represents the philosophy of Parliament when it passed the first bigamy statute in 1603, it is a wise and humane view which would probably commend itself to Parliament if the matter were to be debated today.

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[1] See " Turning a Blind Eye " [1954] Crim.L.R. 271.

Where the policy of a particular department of the law is a matter of acute public controversy, the police may rid themselves of embarrassment by taking a middle course, neither seeking of their own volition to put the law in motion nor refusing to act when called upon. In other words, the police may take the attitude that it is not their business to look for trouble, but that they must take up complaints when these are made by members of the public. This is generally the policy with regard to obscenity. The Chief Constable of Cambridge, in a recent broadcast, said: "We do not go round bookstalls reading the more lurid literature to see if it is obscene, in the hope of getting a prosection. We usually have a complaint about a particular book or books which are said to outrage public decency, and then we make an investigation."

The control of police prosecutions rests with the chief constables, and problems of policy may be discussed between different chief constables of the district at their quarterly meetings. The districts also send representatives to a meeting in London, and at any of these meetings, district or national, the Director of Public Prosecutions may be invited to be present. In this way, through the interchange of views, something may be done to promote uniformity in prosecuting, since it is clearly undesirable that the administration of the criminal law should vary from one county to another.

✓✓ Although the authorities are sometimes blamed for exercising their discretion not to prosecute, the view may well be taken that not only are these criticisms almost always unfounded but the true criticism is that the discretion is not exercised enough. Persons of unsound mind, for example, are too readily prosecuted for murder. If a person is clearly of unsound mind and would have a defence on the ground of insanity, then, even though he is a killer, he should be certified in the ordinary way, as I am told by Professor T. B. Smith is the practice in Scotland, and not subjected to a criminal trial. There is no sufficient reason for the view that, just because a lunatic has killed a man, the ordinary process of certification must be superseded by trial by jury.

There is, of course, some risk in entrusting officials with a discretion in prosecuting, because it may result in favouritism being shown. In the United States, the exercise of what is really a dispensing power by local public prosecutors, often with an eye to their own popularity and advancement, or under the influence of unscrupulous persons, has from time to time given rise to just this abuse. The almost total absence of allegations of this kind in England is a tribute to the integrity of the police. Also, the police in England cannot withdraw a prosecution, once it has been started, without leave of the court (when the case must be reported to the

Director of Public Prosecutions), or intervention by the Attorney-General; in America mere local prosecutors can enter a *nolle prosequi* without control or supervision.

### *Checks upon prosecution*

Apart from the occasional requirement of official consent, there are certain checks upon prosecution which give the accused some protection. The magistrates may refuse to grant process, and if they do grant it may dismiss the charge at an early stage on the ground that there is no case to answer; and the prosecutor must bear in mind the possibility of being sued for damages if the charge fails, and if it can be shown that the prosecution was malicious and brought without reasonable cause.

The first of these checks deserves further discussion. Except where summary arrest is allowed by law, proceedings must be started by a summons or warrant granted by a judicial officer, namely, a justice of the peace, the purpose of the requirement now being to protect the subject from vexatious prosecutions and arrests. This is not the remote historical explanation: when justices of the peace commenced the practice of issuing warrants of arrest it was in order to promote and validate the arrest of criminals, rather than as a safeguard for the innocent. But the latter aspect came to the fore in the arguments upon the general warrants in the eighteenth century. The objection to the issue of general warrants was that they delegated the power of arrest and seizure to constables and king's messengers, when the law had confined these powers, in general, to justices of the peace and the Secretary of State. As Lord Mansfield said in the great case of *Leach* v. *Money* (1765) 19 St.Tr. 1001 at 1027, " it is not fit that the judging of the information should be left to the discretion of the officer. The magistrate ought to judge, and should give definite directions to the officer."

In theory the same view is taken of the summons granted by a magistrate. Even the issue of a summons may place a public stigma on the defendant; and besides, he is compellable to answer it, and may be put to great inconvenience and some expense in doing so. There would hardly be any point in confining the power to issue summonses to the magistrate if he could not satisfy himself that there is a case for issuing it. Hence the magistrate may refuse to issue a summons or warrant if the proceedings appear to be vexatious (*Re Vexatious Actions Act, 1896, Re Boaler* [1914] 1 K.B. 122 at 133); and, in fact, he has a general discretion even where a *prima facie* case has been made out, provided that he exercises this discretion upon principles that commend themselves to the High Court. The two most striking examples of the exercise of discretion against the prosecutor concern charges under antiquated religious legislation. One is *R.* v. *Bros* (1901) 66 J.P. 54, in which Lord Alverstone C.J. said: "I do not think it can be disputed that justices may, in the exercise of their discretion, refuse to issue a summons, even if there were evidence of an offence before them, if they considered that the issue of a summons would be a vexatious and improper proceeding." The other case is *R.* v. *Kennedy* (1902) 86 L.T. 753, where a summons was sought by a private informant under a section of an Act of 1829, now fortunately repealed, which made it a misdemeanour for any person to become a Jesuit, on pain of being banished from the realm. The magistrate refused to issue the summons, on the ground that there had never been a prosecution under the section, and that if any proceedings under it were then to be commenced, they should be commenced by the Crown. On an application for a writ of mandamus to compel the magistrate to issue the summons, the High Court refused to interfere. This is a rare instance of judicial discrimination against the private prosecutor; and the decision is all the more remarkable because statutes are supposed not to lose their force through lapse of time or changed ways of thinking. Darling J., indeed, seemed to say that the statute was obsolete, because it persecuted opinion and was contrary to the genius and spirit of the present time. He quoted from Holliday's *Life of Mansfield* an instance of a somewhat similar refusal by that great judge to enforce an obsolete legislative measure. But the majority of the Divisional Court, Lord Alverstone C.J. and Channell J., took a more limited view. Instead of saying that the statute was altogether obsolete, they subscribed in effect to Bacon's dictum: "Let penal laws, if they have been sleepers of long, or if they be grown unfit for the present time, be by wise judges confined in the execution." So these two judges based their decision on the fact that the magistrate had not held the statute to be wholly unenforceable, but had merely exercised his discretion to refuse the summons to a private informant, having regard to the nature of the statute which it was attempted to enforce and to its complete desuetude. Both these judges pointed out that the private prosecutor was not altogether deprived of the opportunity of proceeding, because he could still present a bill of indictment to a grand jury. At the present day this alternative is not possible, the grand jury have been abolished, and a refusal by a magistrate to issue a summons, if upheld, would make it impossible to take criminal proceedings—except that the informant could take his application around other magistrates (if any were available in the area) in the hope of finding one who would act.

On one occasion a magistrate refused to issue process for abortion against the mother herself (9 *Journal of Criminal Law* 1). No application was made to the Divisional Court for a mandamus, so that it cannot be said with confidence whether the refusal was lawful. But some indication that the magistrate would have been upheld is afforded by *Peake* (1932) 97 J.P. 353, where it was ruled that a woman who gave evidence was not privileged to refuse to answer a question whether she had suffered an abortion, on the ground that this answer might incriminate her, because there was no substantial possibility of a prosecution being instituted against her. This seems to give judicial approval to the demise of the abortion statute as regards the mother herself.

Another instance of a proper exercise of discretion is *R.* v. *Ingham* (1849) 14 Q.B. 396, where it was held that a magistrate may refuse to hear evidence on an information for perjury where the suit in respect of which the alleged perjury was committed is still depending.

However, where a magistrate refuses to issue process for a wrong reason, mandamus will lie. Thus, a mandamus was granted against justices who had refused to issue a summons for perjury merely because the perjured evidence had been accepted as correct in the case in which it was tendered, this amounting to a refusal of jurisdiction under a mistaken view of the law (*R.* v. *Fawcett* (1868) 19 L.T. 396), and similarly where the summons was refused on the ground that it was out of time, the justices not realising that the offence alleged was a continuing one and so not out of time (*R.* v. *Byrde & Pontypool Gas Co.* (1890) 55 J.P. 310).

In *R.* v. *Adamson* (1875) 1 Q.B.D. 201, an application was made to magistrates for summonses against certain persons to answer a charge of conspiracy to break the peace at a public meeting organised by a body calling itself the Magna Charta Association, which was gathered to hear an address by Dr. Kenealy, the fiery counsel for the defence of Orton in the Tichborne case. The justices refused the summons, and in answer to a rule nisi for a mandamus, made an affidavit saying that the reason for the refusal was that the facts brought before them were not, in their opinion, sufficient to justify them in summoning the persons accused to answer for such offence. On this the Divisional Court made the rule absolute, for the reason that the evidence put before the magistrates was so strong that in rejecting the application for the summons they must have acted upon some extraneous consideration, such as their distaste for the views promulgated by Dr. Kenealy.

The fact that a magistrate can refuse to grant process for valid reasons means that it is not strictly correct to say that a citizen can prosecute. All that he can do is to ask for process; the grant of process is not automatic as in a civil action. However, refusals are rare and summonses are ordinarily issued as a matter of routine. So much is this so that it is the practice for a senior police officer or representative of a Government Department to ask for a summons, even though he has no personal knowledge of the grounds of suspicion but acts merely on hearsay from another officer; and the law is that he need not make a sworn statement, even as to his belief. The magistrate is thus treated merely as a clerk to issue the necessary document. In 1954 Mr. E. R. Guest, of the West London Magistrates' Court, intimated some disquiet at this practice, but after consideration he issued the summons requested even on hearsay evidence (*The Times*, April 28, 1954). It would not be practicable to enforce a general requirement of personal knowledge on the part of the informant, because this would mean that the police could never prosecute on information supplied by a citizen. There would perhaps be no insuperable difficulty in requiring an informant who has no personal knowledge to produce evidence from a witness; but this would tend to an undue duplication of procedure, and in a complicated case might mean that the application for the summons would become something like a preliminary trial. Thus, on the whole, it seems that Mr. Guest's considered opinion is right, and that the magistrate has no option but to accept a hearsay information for a summons from the police or an officer of the Crown.

It is, in fact, somewhat vexatious for the police to have to apply for a summons at all, if the case is such that they would have power to arrest summarily. Suppose that the offence is one for which the police can arrest without warrant, but they do not choose to exercise their power owing to the triviality of the case. It seems somewhat absurd that this very proper forbearance on the part of the police should involve them in the necessity of going before a magistrate in order to obtain a summons. The only case where a safeguard is really necessary is where the summons is applied for by a private prosecutor, who may be making a frivolous complaint or actuated by malice. Here, the private informant should be compelled to put his information in writing, sign it and swear to it, in order that his allegations may be compared with what he subsequently swears at the trial. There is, unfortunately, no legal requirement of this where only a summons is asked for. Where a warrant of arrest is required to be issued, the Magistrates' Courts Act, 1952, s. 1 (1), provided that the information shall be " in writing and substantiated by oath." The better view is that this requires evidence to be sworn, and the evidence must be legal evidence, not hearsay.

Even where only a summons is sought, the magistrate may well exercise vigilance over applications by private prosecutors, and in case of doubt insist on hearing the principal witnesses before issuing the summons. It should also be the practice to bind over a private prosecutor to prosecute. At present he may, if not bound over, withdraw before the hearing and thereby give the person summoned no proper opportunity of denying the allegation. It is true that the defendant may waive the non-appearance of the prosecutor (*May* v. *Beeley* [1910] 2 K.B. 722), but if the prosecutor has not brought his witnesses to court, the defendant is deprived of the opportunity of cross-examining them.

# *Mr. Sutterthwick's Court*

By A. E. JONES, *Magistrates' Clerk*

### The missing overcoats

Mr. Sutterthwick looked at the register as Leslie Hooper and Ronald Thornton were brought into the court room. "That's odd," he murmured to Frell, the clerk, "the next case is a charge of stealing an overcoat, too. Is there an epidemic in the neighbourhood?"

There was another charge against Hooper and Thornton; in addition to the actual larceny alleged against them they were accused of being "suspected persons loitering in Church Road, East Street and Grove Lane with intent to commit a felony, to wit, stealing from unattended cars."

### *Youthful sinners*

Mure, the assistant gaoler, directed Leslie Hooper into the dock and placed Ronald Thornton in front of it. Ronald was only "16 2/12," as the charge sheet put it, whereas Leslie was 17 and so beyond the special treatment accorded to juveniles in the court.

"Call the parents of Thornton" said Frell to Sergeant Quing, the warrant officer.

A fat, discontented-looking woman came somewhat reluctantly from the back of the court and admitted that she was Mrs. Thornton. Her husband couldn't come because of his work, she explained in answer to the clerk's inquiry. Her reply was not audible when Mr. Sutterthwick queried "He thinks that's more important than this?" The magistrate did not pursue the matter and a chair was put for her next to her son so that he should have the benefit of what help she could give him in the conduct of his defence. Mr. Sutterthwick felt it only right that children and young persons should be given this privilege in the adult court since the statutory rules insisted on it in the juvenile court.

The next step in the proceedings was to explain to the defendants that on the charge of stealing an overcoat they could either be tried by a jury or consent to the magistrate trying the case. In addition the clerk had to inform Hooper that, should he be convicted by the magistrate, he might be sent to quarter sessions to be sentenced there if, after his character and past had been revealed, the powers of punishment possessed by a summary court were felt by the magistrate to be inadequate to meet the case. This possibility did not apply to Thornton but, again following what was strictly only juvenile court procedure, Frell informed him that he could ask his mother's advice whether or not to be tried by a jury.

The youths did not appear very interested in what the clerk had to say but, at the end of it, they consented without hesitation to be dealt with summarily, and with equal readiness pleaded guilty to both charges. Thornton made no attempt to consult his mother in the matter; he had not even glanced at her since she came to sit beside him.

The story of the offences was soon told by the detective sergeant in charge of the case. Two plain clothes officers had watched the accused from 11.10 until 11.43 the previous night and seen them look into a number of parked cars and try to open the doors of three which contained property. When stopped and asked what they were doing, Hooper replied, "Nothing. We were just having a walk round," while Thornton said, "You can't pin anything on us so I suppose you'll do us as susses." The defendants were informed in more official terms that that was indeed what the officers proposed doing. Thereupon Hooper said, "All right. You may as well know. I've got to get somewhere to live and I'm broke"; Thornton said, "That's right. I was only trying to help a pal." At the police station it was noticed that the overcoat Hooper was wearing suggested affluence rather than hard-upness. He was questioned about it and obligingly admitted stealing it from an unattended car. Thornton, with a similar helpfulness, admitted keeping watch while the theft was committed. They were able to take the detective sergeant to the car in question, thus enabling him to inform the owner of his loss before he himself had discovered it. After what they had already said it mattered little that the defendants made no reply when formally charged.

"Is anything known about them?" asked Mr. Sutterthwick.

"The juvenile defendant," said the detective sergeant, "has been dealt with twice previously by the juvenile court and is at present on probation for the last of those offences. . . ."

"Then I needn't hear any more about him," interrupted the magistrate. "He'd better go back to the juvenile court."

"Is there anything you want to say to me?" he asked Thornton.

"No, sir."

"Then I shall remit your case to the juvenile court. They'll decide what to do with you." To Mrs. Thornton he added, "Both you and your husband ought to be at the juvenile court when his case is heard. You'll be able to say anything you want to about him there."

"Can he have bail?" she asked.

"No. I think it'll be better to keep him in the remand home at present."

Ronald Thornton accepted this decision without apparent emotion, but his mother left the court muttering to herself and looking more discontented than ever.

*Another chance*

"Now, what about Hooper?" said Mr. Sutterthwick to the detective sergeant.

"This lad, your worship, has no previous convictions or findings of guilt. He is seventeen years of age and attended school until he was fifteen. He has had several jobs since, but for the past five months has been employed as a capstan hand at a wage of £4 5s. 0d. a week. He had a quarrel last night with his father and left home in consequence. He had nowhere to go and apparently struck up an acquaintance in a café with Thornton, and I think he was led into this by the younger lad. I understand that the trouble at home is over his father's housekeeper" (the officer's slight pause before the last word gave it the intended significance). "His mother died a little over a year ago. His father refused to bail him out last night, but he has come to court this morning if you wish to see him, your worship."

"Yes," said the magistrate, "I should like to."

Mr. Hooper senior came forward from the back of the court and entered the witness box. He wore an anxious look and his best Sunday clothes.

"I thought I'd learn him a lesson last night, sir, but he's always been a good boy, sir," he burst out hurriedly. " I can't make out what made him do this. I don't think he meant any harm really."

" Well, you've heard him admit that he did," commented Mr. Sutterthwick drily. " Where does he get these ideas of stealing from cars from?"

" I don't know, sir. Not from me. I've always been respectable and brought all my children up respectable too. I think it's these here 'caffs' he's been hanging around lately. I believe he's been getting into bad company."

" I gather he's not getting on very well at home just now?"

" There has been a little trouble," admitted Mr. Hooper reluctantly. " But I'm quite willing to have him back home and look after him. I'll see it won't never happen again."

Mr. Sutterthwick turned to the defendant. " What have you got to say about this?" he demanded.

" Nothing," was the mumbled reply.

" What on earth made you throw a good character away and do a thing like this?" persisted the magistrate.

" I don't know, sir."

" Are you going to start making yourself a thief every time you meet a bit of trouble in life?"

" No, sir."

" Well, I hope not. This sort of thing isn't showing any guts, you know. Fancy allowing yourself to be led away by a boy younger than yourself."

Leslie Hooper looked miserably at the dock rail and said nothing.

The magistrate spoke to Thorburton. " I suppose you haven't seen him yet?"

" No, sir," was the response. The probation officer did not make inquiries about a defendant until his guilt had been established. Before his trial the defendant was likely to prove unresponsive to the investigations of an outsider into his private life. Experience had shown that he became much more communicative when he realised that his future might depend on the probation officer's report. A week's remand while the ultimate decision remained unpronounced often gave the probation officer a chance to establish a position in the esteem of the defendant which would be the foundation of the future relationship.

" I would like an opportunity to make some inquiries in this case if you were considering probation, sir," said Thorburton.

" I think we've got to the bottom of the trouble with what we've heard already," decided the magistrate. " This young man clearly wants somebody to keep an eye on him for a time. And I don't feel it would be wise for him to return home just yet awhile. What about a hostel?"

"Yes, I was thinking of that myself, sir," said Thorburton. "But I'm afraid I can't arrange it straight away; and the hostel will want the usual assurance about his health, of course, sir."

"I don't particularly want to remand him in prison for a week just to get a medical report for that purpose," said Mr. Sutterthwick.

"Will you stay at home for a few days, until the probation officer can fix you up in a hostel?" he asked Hooper, and added "You understand, *stay* there."

"Yes, sir."

"And no more of this sort of behaviour?"

"No, sir."

The magistrate turned again to the probation officer and said, "He can be examined by a private doctor and if there's any fee the Poor Box will meet it."

Thorburton would have preferred a week's remand—although he knew that all the things he ought to know about the case would probably not be revealed to him in that time and some might be deliberately kept from him for months even. However, he had enough experience and confidence in his powers to feel pretty sure he could win and hold this lad's trust without the lever of a week's suspense. And, anyway, it was for the magistrate to decide.

"Very good, sir," said Thorburton. "I'll do my best to help Leslie, and I think I can if he'll let me."

"Leslie Hooper," said the magistrate, "you've been guilty of an offence for which, young as you are, you could be sent to prison for six months—if I thought there was no other way of dealing with you. But I believe there is another way. You mustn't expect another chance like this, though. I propose to put you on probation—that means, on trial—for twelve months. You'll be under the supervision of a probation officer and you must report to him as he directs, and inform him of any change in your address or work. Remember, he's there to help and advise you, and he's got a lot of experience. Take all your troubles and difficulties to him and discuss them openly and frankly with him, as you would with a friend—which is what he will be to you. But remember, also, that it depends upon you really whether you make good or not. Show you've got a backbone if you're tempted to do wrong. If you go through the next twelve months satisfactorily you won't be punished for the offences you've just committed. But I must warn you that if, in that period, you commit another offence or break a condition of your probation, you can be sentenced on these present charges. Now do you understand what's expected of you, and do you agree to accept the conditions I've mentioned?"

Young Hooper looked somewhat startled at being asked such a question, but he found sufficient presence of mind to say "Yes, sir."

"When Mr. Thorburton has found a suitable hostel for you I shall probably ask you to agree also to its being made a condition of your probation that you live there. You'll go out to work from the hostel, so you'll be able to stay on in your present job—provided your employer wants you, of course. That's all now."

### *And an old reprobate*

Mure escorted the probationer away and brought back the other case of overcoat stealing. This was "Remand Number 1, Robert Hitchcock." It was a harmless-looking person who entered the dock—a thin, drooping figure in worn but neat clothes; a man already old and frail at sixty-two. A week ago he had accepted the magistrate's jurisdiction and pleaded guilty to stealing an overcoat, value £3 10s. 0d., the property of one James Burton, a labourer working on a building site. Hitchcock had sneaked onto the site unobserved and, finding unattended portable property, had walked off with it. Unfortunately for him the overcoat was too big for him to wear without attracting attention, and the very fact that he was not wearing it attracted the attention of an alert constable. He could give no convincing answers to the customary questions and was not long in making a full confession of his offence. Once again the police had recovered stolen property before it had been missed.

The defendant did not go so far as to confess that he had been committing petty larcenies of this kind for some time without being detected; but he had to admit a long list of previous convictions in the past. Thirty years ago he was leading a very active life of crime, the offence he particularly favoured being warehouse breaking. Then, after a sentence of seven years' penal servitude, his record file lay idle in the police archives for many years. Eight months ago, however, another entry was made in it: he was convicted of stealing a handbag from an office in a neighbouring district. He had gone into the premises, looking for work, he said, and had fallen to temptation when he saw the handbag lying on a table in an empty room. The magistrates' court before which he appeared gave him credit for nearly a quarter of a century's good conduct and discharged him absolutely.

In the previous week a detective constable had given this skeleton history to Mr. Sutterthwick, and added a little flesh with the information that twenty years ago the defendant had married and started steady work which he had kept until two years ago. Then he cut his hand on a broken jam jar at home and the wound turned septic. He lost the proper use of his hand, and his job. His wife had died some five years previously and he had moved into lodgings. They had never had a family so now he was left to fend for himself alone on National Insurance benefit.

The magistrate had remanded Hitchcock for a week in order that Caylip, Thorburton's junior colleague, could go into the case and see whether there was any possibility of putting the man on a firm financial basis again. To help assess prospects the prison doctor was asked to report on the likelihood of the defendant's regaining fitness for work.

Frell handed the medical report to the magistrate. Caylip had already seen it and knew that in the doctor's opinion Hitchcock would be unlikely to recover the full use of his hand, and in view of his age and rather poor general health would probably remain permanently unemployable.

"Have you anything to suggest?" said Mr. Sutterthwick to Caylip after he had read the report.

"Well, sir, I've been having a talk with this man and I've been pointing out the difficulties to him. He's got no home and has been living in common lodging houses, but even so he finds it a struggle to make ends meet on what he gets from National Insurance and National Assistance. He's pretty certain to get into more trouble if he goes on living as he has been doing. I've explained to him that the only solution really is for him to go into the Institution. But I think you should know that he was discharged last time on his promise that he would do so. He's told me that, in fact, he discharged himself after a week or so, and, of course, there was nothing to prevent him. However, I do believe he realises now that it will be in his own interests to go back and stay there. I think, though, it might be as well to test his genuineness by a remand before you finally deal with him, sir. I would keep in touch with him if you are prepared to give him another chance."

"Thank you, Mr. Caylip. I think that's a very good suggestion," said the magistrate, and turned to the prisoner.

"You know, what you did was a mean thing, Hitchcock," he said. "The person you stole from was only a working man and he couldn't afford to lose an overcoat. I have the power to send you to prison for six months for it, as I expect you know. But

I don't want to have to do that. I'm impressed by the long period during which you kept straight after the very bad start you made in your life. I'm also taking into account the misfortune you've had. But it doesn't justify you in stealing. No amount of hard luck does that. I'm willing to try leniency with you but I want to be sure that you won't go stealing overcoats or anything else again. You can't go on drifting about like this with no work and nowhere to live. It'll only lead to more trouble. Will you promise me to go into the Institution and stay there this time?"

"Yes, sir. Yes, sir. I really will this time. I promise you."

"Very well. I'll remand you for three weeks on your own bail in five pounds to see if you do. Mr. Caylip here will keep in touch with you and help you all he can. I shall take a very serious view of it if you leave the Institution without his approval. Of course, if he can find you a light job of some kind, all well and good. But otherwise I expect you to stay inside out of temptation."

"Yes, sir. Thank you, sir. I'll do as you say. I'll behave myself again now, sir," said the defendant, and left to sign an entry which recorded that he owed Our Sovereign Lady the Queen five pounds of good and lawful money to be levied on his goods, lands and tenements unless he appeared at the court three weeks hence.

# *The Fraudulent Intent in Larceny: Another View*

By J. C. Smith, *Barrister-at-Law*

Wing-Commander Lowe in a learned and interesting article on "The Fraudulent Intent in Larceny" in [1956] Crim.L.R. 78, argues that the only effect of the word "fraudulently" in the definition of larceny is to exculpate one who takes the property of another, intending permanently to deprive the owner thereof and knowing that he has not the owner's consent, but believing that the owner would have consented had he been asked. According to this view one who takes another's money, knowing that the owner has not consented, and would not have consented had he been asked, is guilty of larceny although he intended to replace an equivalent sum almost immediately and although he had ample ability to do so.

This view has much to commend it; it gives meaning to the word "fraudulently," it is simple and precise and it is supported by the analogy of the proviso to section 28 (1) of the Road Traffic Act, 1930. But it is submitted that it produces at least one unsatisfactory result in that it gives—in effect—greater protection to the owner of money or fungible goods than to the owner of non-fungible goods; it would make a felon of a taker of money or fungible goods while letting an equally blameworthy taker of non-fungible goods go free. If I take your clock knowing that you have not consented to my doing so, and would not have consented had you been asked, and I pawn it, intending to redeem it, and knowing that I shall certainly be able to do so within a few days, it appears that I am not guilty of larceny.[1] Whether I am fraudulent or not does not arise in this case; I am excused because I do not intend permanently to deprive you of your property. Probably I am not guilty even if I am not certain of my ability to redeem the clock, but have a fair and reasonable prospect of being able to do so. But if I take your £1 note with precisely the same state of mind, except that I intend to return not that note, but another exactly similar note which is just as good to you in every respect, according to Wing-Commander Lowe's view, I am guilty. The taker of the money is certainly no more blameworthy than the taker of the clock and may be less in that he is certain that he can replace it by an equivalent sum, whereas the taker of the clock believes only that he has a fair and reasonable prospect of being able to return the clock. Yet the former, according to Wing-Commander Lowe's view, is a felon and the latter is guilty of no crime.

If I take your car and drive it for a hundred miles before returning it to you, it is still no larceny (though a summary offence under the Road Traffic Act, 1930) even if I know that you do not consent, and would not have consented, to my taking the car. Yet in taking your car I intend you more harm than in taking your money. The money which is restored is just as good in every respect as that which was taken, but the car has suffered wear and tear and is one hundred miles nearer to the scrap-heap. Furthermore it has been subjected to much greater risks than your money. On the other hand, according to Wing-Commander Lowe's view, I would be guilty of larceny of your petrol which was in the tank of the car when I took it, even though I intended throughout to fill it up, and did fill it up, with an equivalent amount of petrol of equal quality, before returning it to you. Yet you have suffered no harm whatever in respect of the petrol.

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[1] *R.* v. *Phetheon* (1840) 9 C. & P. 552; *R.* v. *Medland* (1851) 5 Cox C.C. 292; *R.* v. *Trebilcock* (1858) 7 Cox C.C. 408; *R.* v. *Wynn* (1887) 16 Cox C.C. 231.

If there is some reasonable construction of the word " fraudulently " which will avoid these anomalous results, it should surely be adopted. For this reason it is submitted that the construction advanced by counsel in *R.* v. *Williams* [1953] 1 Q.B. 660—though perhaps less precise than Wing-Commander Lowe's suggestion—is to be preferred. Counsel argued that the word should be construed to mean: " intending to act to the detriment of any person against that person's wishes." It was admitted that, even within this definition, persons—like the accused in *R.* v. *Williams*—who merely hope to be able to repay in the future and lack present ability to do so are fraudulent in that risking another's money against his will is plainly acting to his detriment. But where no risk is involved, in that ample means are available for repayment, no detriment is intended and therefore, according to this view, there is no fraud. This accords with the dictum of the Lord Chief Justice in *R.* v. *Williams*:—

> It is one thing if a person with good credit and with plenty of money uses somebody else's money which may be in his possession and which may have been entrusted to him or which he may have had the opportunity of taking, merely intending to use those coins instead of some of his own which he has only to go to his room or to his bank to obtain. No jury would then say that there was any intent to defraud or any fraudulent taking.
>
> It is quite another matter if the person who takes the money is not in a position to replace it at the time but only has a hope or expectation that he will be able to do so in the future. . . .[2]

Lord Goddard is surely right in saying that no jury would hold that the man who has present ability and the intention to repay is guilty of fraud, and, if that be so, there is no doubt that it is desirable that the legal definition of fraud should exclude a person so acting. That he has, as Wing-Commander Lowe says, " wilfully flouted the prosecutor's proprietary rights " is admitted, but so has the man who pawns another's clock, and he may not be guilty of a crime. Many instances may be given of unlawful invasions of proprietary rights which are left to the remedies of the civil law. The criminal law is generally invoked only where there is force or fraud, and a wilful flouting of another's proprietary rights does not necessarily involve either of these elements. It is perhaps well to bear in mind in this connection the view of Baron Bramwell (*R.* v. *Middleton* (1873) L.R. 2 C.C.R. 38, 54) that "It is a good rule in criminal jurisprudence not to multiply crimes, to make as few matters as possible the subject of the criminal law, and to trust as much as can be to the operation of the civil law for the prevention and remedy of wrongs." To adopt the wide definition proposed by Wing-Commander Lowe would, it is respectfully submitted, be to ignore this good rule.

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[2] [1953] 2 W.L.R. 937, 942; [1953] 1 All E.R. 1068, 1070. This passage was omitted from the reports of the case in the *Law Reports* and the *Criminal Appeal Reports*, possibly because it was seen, on reflection, that the views expressed did not accord with the meaning attributed to the word " fraudulently " by the Lord Chief Justice. See [1955] Crim.L.R. 18, 25.

# ***Putting Character in Issue***

By J. D. Newton, *Barrister-at-Law*

The case of *R.* v. *Clark* [1955] 3 W.L.R. 313 ; [1955] Crim.L.R. 567, prompts a reconsideration of that part of proviso (*f*) to section 1 of the Criminal Evidence Act, 1898, which enables the prosecution to cross-examine the accused as to his previous convictions and character, where " the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution."

Primarily, section 1 of the 1898 Act enabled the accused, in most cases for the first time, to give evidence on his own behalf. Consequently, the accused became subject to cross-examination, and in order to maintain his right not to have his character revealed to the jury before verdict, the Act provided that he should not be cross-examined as to his character and previous convictions. However, to this, proviso (*f*) sets out certain exceptions, including the case now under discussion, where the nature or conduct of the defence is such as to cast imputations on the prosecutor or his witnesses.

The difficulty arises where the accused is unable to develop fully his defence without making such imputations. Of course, if the accused does not give evidence on oath, and does not put his character in issue, he may attack the character of the prosecutor and his witnesses with impunity; see *R.* v. *Butterwasser* [1948] 1 K.B. 4. However, if he does give evidence on oath, how far can he go?

*The liberal view*

When faced with this question the courts have taken two divergent views. In the early cases of *R.* v. *Bridgwater* [1905] 1 K.B. 131, *R.* v. *Preston* [1909] 1 K.B. 568, and *R.* v. *Westfall* (1912) 7 Cr.App.R. 176, what may be termed a liberal interpretation of the section was applied, permitting the accused some latitude in developing his defence without provoking cross-examination as to character. Of the three cases, the most important is *Preston*, where the opinion of the court, consisting of Lord Alverstone C.J., Channell and Walton JJ., was delivered by Channell J., with reference to whom Lord Goddard in *Clark* declared, " no greater authority on these matters ever lived." In *Preston* the accused was convicted of receiving. In examination-in-chief and in cross-examination, in substance he alleged that an identification parade organised by a police inspector who gave evidence for the prosecution was a " got up affair," and that the inspector had deliberately tried to give away his position in the parade. In fact, the accused was not identified on this parade. As a result of his allegations, the accused was cross-examined as to his previous convictions, and on this ground he successfully appealed, the Court of Criminal Appeal quashing his conviction.

Channell J.'s judgment in *Preston* has been frequently quoted in subsequent cases and has been given various interpretations. No doubt the case was border-line, but it is submitted that the whole tenor of the judgment implied a distinction between imputations which are relevant to the defence, and those which are introduced merely as an attack on the credibility of the prosecutor or his witnesses. Channell J. quoted the following passage from the judgment delivered by Lord Alverstone C.J. in *Bridgwater,* which, although referring to the particular facts in that case, nevertheless, in his opinion, laid down the general rule in this matter: " . . . the prisoner's counsel by his questions to Moss was not doing more than developing his defence that the prisoner believed he was acting under Moss's directions and seeking to substantiate that defence by means of admissions from Moss. If the questions put to Moss had involved the imputation that he was guilty of misconduct independently of the defence, or of the necessity for developing the defence, different considerations might arise, for the questions might then perhaps be construed as an attack on the prosecutor's general character." In the report of *Preston* in the *Criminal Appeal Reports* (2 Cr.App.R. 24, 26), Channell J. is reported as going on to say: " It is true that the appellant in the course of his evidence referred to matters which, if true, amounted to a serious charge against the inspector. But the question of identification cannot be said to have been irrelevant to the appellant's defence. It was natural that the appellant should refer to it. We do not think that, because a prisoner, perhaps inconsiderately, but naturally, and with reference to his defence, makes a statement of this kind, the statute means that his career is to be exposed."

### *The strict view*

However, side by side with this approach to the section, the courts have taken a more strict view. In *R.* v. *Hudson* [1912] 2 K.B. 464, where the defence was that the offence had been committed by one of the witnesses for the prosecution, cross-examination of the accused was permitted and upheld on appeal. *Preston, Bridgwater* and *Westfall* were not overruled but were distinguished, and the court purported to follow the early case of *R.* v. *Marshall* (1899) 63 J.P. 36. Lord Alverstone in delivering the opinion of the court said: "We think that the words of the section, 'Unless . . . the nature or conduct of the defence is such as to involve imputations,' etc., must receive their ordinary and natural interpretation, and that it is not legitimate to qualify them by adding or inserting the words 'unnecessarily,' or 'unjustifiably,' or 'for purposes other than that of developing the defence,' or other similar words."

The liberal view reached what might be termed its "highwater mark" in *Stirland* v. *D. P. P.* [1944] A.C. 315, 327, where Viscount Simon observed, "an accused is not to be regarded as depriving himself of the protection of the section, because the proper conduct of his defence necessitates the making of injurious reflections on the prosecutor or his witnesses." However, it must be admitted that this dictum was obiter and, as Viscount Simon only referred in support of his contention to *R.* v. *Turner* [1944] K.B. 463 (see below), a case which was decided on a narrow and special ground, his view may not warrant the wide interpretation which at first sight it implies. Furthermore, in the subsequent case of *R.* v. *Jenkins* (1945) 31 Cr.App.R. 1, the Court of Criminal Appeal considered that *Stirland* v. *D. P. P.* had not overruled the decision in *Hudson,* although in *Jenkins* a major aspect of the defence was a deliberate attack on the general character of the prosecutrix in order to shake her credibility, so that the accused had clearly rendered himself in that case liable to cross-examination as to character.

### *Qualifications of the strict view*

No doubt the strict view as expressed in *Hudson* is in accord with the correct initial approach to any statute and must prima facie prevail. Lord Goddard in *Clark* [1955] 3 W.L.R. 313, 316, considered that " The first duty of the court is to read the statute, consider exactly what it states, and apply it." But the question still remains how far the court will go in practice in applying this view. It is suggested that the following general qualifications of the strict view can be made out:—

(i) First, whatever view is taken of the true construction of the section, imputations made against the magistrate who conducted the committal proceedings or against members of the police force who do not give evidence for the prosecution do not come within the proviso since the persons against whom they are made are neither the prosecutor nor his witnesses: *Westfall*. Furthermore, in cases of murder and manslaughter, imputations against the deceased are outside the proviso because the deceased cannot in any sense be considered the prosecutor: *R.* v. *Biggin* [1920] 1 K.B. 213.

(ii) A mere denial of evidence given by the prosecution will not let in cross-examination as to character, even though it is expressed in vehement terms such as calling the prosecutor a liar: *R.* v. *Rouse* [1904] 1 K.B. 184. If this were not so a plea of ' not guilty ' might possibly be construed in some cases as an imputation. Lord Goddard in *Clark* observed, at p. 320: " I do not believe that any judge would allow a roving cross-examination into the prisoner's past merely because he said ' The police constable is a liar,' or ' The police constable is not telling the truth ' ; for all he is doing is pleading not guilty with emphasis."

(iii) A further limitation would appear to be where the defence suggests that the prosecutor or his witnesses are not to be believed on their oath on the ground that their evidence in the case makes them unreliable witnesses. This limitation was recognised by Channell J. in *Preston* [1909] 1 K.B. at p. 575, where he distinguishes between the proposition that the jury ought not to believe the prosecutor or one of his witnesses on the ground of his conduct outside of the evidence given by him and the same proposition based on that evidence. Thus it is suggested that inconsistencies and other apparent defects in the evidence given by the prosecution may be the subject of cross-examination or comment by the defence, even though the implication may be that such evidence is perjured or fabricated. For example, comment by the defence that the records of an oral confession taken down in the notebooks of two policemen, called as witnesses for the prosecution, are identical, thus implying a conspiracy between the two officers, would not involve cross-examination as to character.

(iv) A further limitation is where the accused is deliberately entrapped into making ' imputations ' by the questions put to him in cross-examination: *R.* v. *Baldwin* (1925) 18 Cr.App.R. 175. It would also appear to be the case where the prosecution, without any such intention, puts the accused into a dilemma during cross-examination so that, in order to defend himself, he can only resort to allegations which amount to imputations. In *R.* v. *Eidinow* (1932) 23 Cr.App.R. 145, the accused was charged with fraudulently converting £10, the proceeds of a cheque. The defence was that the accused had given the cheque to one Earle, who gave evidence for the prosecution, in order to get it cashed, and that Earle had never handed the proceeds of the cheque to him. Avory J., who delivered the judgment of the court quashing the conviction, said (at p. 149): " The accused was placed in this dilemma: Having been asked, in effect, ' What is your answer to this charge? ' he said, ' My answer is that I never received the money, and as I never received it, Earle must have kept it.' Then he is told: ' If that is your defence, then you are making an imputation on Mr. Earle, a witness for the prosecution, and unless you withdraw it, I shall let the jury know about your previous character ' . . . In these circumstances we are of opinion that the defence which this man wished to put forward was, in effect, withdrawn from the jury by their being told beforehand that the witness for the prosecution is a perfectly respectable witness whose evidence they should accept, while the accused is a man of bad character whose evidence they cannot accept."

(v) A special exception has been made in the case of rape, in that the prosecutrix may be cross-examined in order to establish consent on her part, even though this involves, as it did in *R.* v. *Turner* [1944] K.B. 463, allegations against her of acts of gross indecency. In *Clark*, at p. 317, Lord Goddard explained this exception on the grounds that the prosecution in charges of rape has to establish that the offence was committed against the will of the prosecutrix as an essential element of the crime, and that therefore, " the prisoner is entitled if he can to destroy her evidence by cross-examination of the prosecutrix, or by giving evidence that one of the incidents of the crime is not present, even though that may involve some imputation on the character of the woman." This exception was finally established in *Turner*, where Humphreys J., who delivered the opinion of the court, said, at p. 469: " In our opinion, this is one of the cases where the court is justified in holding that some limitation must be put on the words of the section, since to decide otherwise would be to do grave injustice never intended by Parliament."

(vi) It is suggested that a further limitation to the strict approach is where the defence is that of provocation or self-defence. In

*R.* v. *Biggin* [1920] 1 K.B. 213 the accused was charged with murder. His defence was that the deceased had made indecent overtures to him, that he had refused to comply, that thereupon the deceased violently assaulted him, and that in the struggle which ensued, the deceased was killed. The accused was cross-examined as to character on the grounds, first, that his defence cast imputations on the deceased, who, it was argued, was in fact the prosecutor, and secondly, that the questions tended to show that the accused did not always speak the truth. The accused was convicted of manslaughter, and on appeal, his conviction was quashed. Lord Reading C.J., who delivered the judgment of the court, considered that the deceased could not possibly be regarded as the prosecutor, so that the first ground on which the cross-examination was permitted was swept away. In the second place, the learned Chief Justice was of the opinion that the cross-examination could not be justified as going to credibility generally, since it was not relevant to prove the charge and otherwise did not come within the provisions of the 1898 Act. The accused had not put his character in issue and, furthermore, the defence did not involve imputations on witnesses for the prosecution. Thus, the question as to whether the defence of provocation or self-defence lets in cross-examination as to character did not directly arise in *Biggin,* but Lord Goddard in *Clark*, with reference to *Biggin*, said, at p. 317: "The prisoner was relying on provocation or self-defence. . . . Somebody had to explain why the attack took place, and until that was explained, and why people should have been in the same room, and why there was a fight, it was impossible for any defence to be developed at all." In the Scottish case of *H.M. Advocate* v. *O'Hara,* 1948 S.L.T. 373, the prisoner was charged with assaulting a police officer, and he pleaded self-defence. In evidence, he alleged that the complainer was the aggressor and under the influence of drink, and as a result he was cross-examined as to his previous convictions. The prisoner was convicted and on appeal his conviction was quashed. The Lord Justice-Clerk (Thomson) carefully considered the English decisions and observed (at p. 374): "It would appear, therefore, that the effect of *Hudson* is to apply to the words of the subsection a severely logical interpretation, and to establish that anything which amounts to an imputation on the character of a witness opens the door to cross-examination of the accused as to his own character. It would appear to follow that an accused person, whose record will not bear investigation before a jury, is in certain classes of cases, for all practical purposes, limited in his defence, and does not enjoy the same right to defend himself to the uttermost as an accused person with a clear record. It would appear also that the prosecutor in cross-examining an accused person, who has opened the door to an investigation of his character, may ask him about any previous conviction whatever . . . and may cross-examine him as to character generally. That such a fate should befall an accused who is charged with assault and endeavours to prove that he has been the victim of aggression, seems difficult to reconcile with the presumption of innocence or even with elementary fairness."

(vii) In any event, even where the nature and conduct of the defence is such as to cast imputations so that in strict law the prosecution has a right to cross-examine the prisoner as to character, the presiding judge has a discretion not to allow such cross-examination. In *R.* v. *Jenkins* (1945) 31 Cr.App.R. 1, Singleton J., as he then was, in delivering the judgment of the court, remarked at p. 15: " He (*i.e.*, the presiding judge) may feel that even though the position is established in law, still the putting of such questions as to the character of the accused person may be fraught with results which immeasurably outweigh the result of questions put by the defence and which make a fair trial of the accused person almost impossible." Lord Goddard in *Clark* underlined this discretion and no doubt it helps to explain the distinction between *Clark* and *Preston*. In *Clark* the defence was that a confession had been fabricated by a chief inspector who gave evidence for the prosecution. As already explained, in *Preston* the prisoner alleged that an identification parade had been " rigged " by the inspector of police who also gave evidence for the prosecution. It would appear that both allegations were equally serious, both implying that the witnesses had " conspired to defeat the ends of justice." However, in *Preston* the allegation was " a mere unconsidered remark made by the prisoner without giving any serious attention to it," and furthermore, since the prosecution's case was not a strong one, the evidence as to character no doubt turned the scales against him. But in *Clark*, the allegation amounted to the principal line of defence. Of course each case must be considered on its own facts. Unfortunately, the Lord Chief Justice in *Clark* drew a distinction between saying " That is not my statement " and allegations of mistake such as, " The officer left out something " or " Well, yes, but he misunderstood me ; he has got down something I did not say ; I missed it when it was being read over, but what I said was something else." The latter allegations are obviously not imputations on character at all. But it is respectfully suggested that a mere denial such as " That is not my statement," although it may well imply that the statement has been concocted by the police, ought not to let in cross-examination as to character. Such a statement would fall under the principles set out in (ii) or (iv) above. Counsel for Clark argued that if cross-examination was allowed in that case, an accused person with a record would never be able to deny a statement. To this argument the Lord Chief Justice replied at p. 320: " If misconduct is to be attributed to police officers, the jury is entitled to know the character of the man making the imputation ; and it is not to be thought that the man who is making the imputation, if he has a string of convictions, stands in the same position as an inspector of police or any other officer who must be a man of good character." The use of the word " must " in the last sentence would appear to prejudge the issue and one has some sympathy with the argument of Clark's counsel. Of course, it is where the case against the accused is in the balance that evidence as to character becomes vital, especially where that evidence has some relevance to the offence charged. In such circumstances, where the allegations are not the substance of the defence, but are a " mere unconsidered remark of the prisoner," as in *Preston,* the court will probably be inclined to refuse cross-examination as to character.

Finally, one cannot help but observe, after looking through the cases, that it is unfortunate that the English courts have not adhered to " the liberal view " in construing the section and drawn the broad distinction, however hard it may be to apply in practice, between imputations necessarily made in developing the defence and imputations introduced merely to attack the general credibility of the prosecutor or his witnesses. This distinction is more in accord with the general presumption of innocence and the Scottish courts have not found any insuperable difficulty in drawing it. The Lord Justice-Clerk in *H.M. Advocate* v. *O'Hara* observed, in relation to cross-examination of the witnesses for the prosecution: " . . . the Statute warrants a distinction being drawn between two sets of cases, however difficult it may be to say on which side of the line any particular case falls, and perhaps for that reason it is undesirable to attempt too rigid a line of demarcation. Broadly the two classes are: (1) Where the cross-examination is necessary to enable the accused fairly to establish his defence to the indictment albeit it involves an invitation to the jury to disbelieve the witnesses so cross-examined in so far as they testify in support of the indictment, and (2) Where the cross-examination attacks the general character of the witnesses."

# *Practice and Procedure*

### Quarter Sessions

*Appeals and committals to quarter sessions*

See below.

### Magistrates' Courts

*Appeals and committals to quarter sessions*

On February 10, 1956, Lord Goddard C.J. gave the following direction while sitting in the Divisional Court.

The Society of Chairmen and Deputy Chairmen of Quarter Sessions has called our attention to the diversity of practice which obtains among clerks to justices with regard to what should be sent by them to quarter sessions when there is an appeal from a magistrates' court and when the latter commit a prisoner for sentence under section 29 of the Criminal Justice Act, 1948, or for Borstal training under section 20. While this court has no power to give directions on the matter, as it is obviously desirable there should be uniformity in practice, we think that we may properly express an opinion in the hope that it will be generally followed. In the case of committal for sentence or Borstal training it is essential that all the information that was before the committing justices should be before the appeal committee of quarter sessions, and accordingly any notes of evidence taken by the clerk and any documents put in at the hearing should be sent, as no doubt they generally are. Our opinion on this matter was, we think, made clear in the case of *R.* v. *Dorset Quarter Sessions, ex p. O'Brien*, February 2, 1953,[1] heard before the Divisional Court.

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[1] R. *v.* DORSET QUARTER SESSIONS, *ex p.* O'BRIEN (Q.B., Divisional Court: Lord Goddard C.J., Lynskey and Pearson JJ.: February 2, 1953) ([1956] 2 W.L.R. 682n.)

Lord Goddard C.J.: The applicant was convicted by the justices of stealing from the person; the facts alone would show that she must have been a woman of bad character . . . and the justices, hearing that she had eight previous convictions, sent her forward for sentence to quarter sessions . . . It is said that because the appeal committee had the ordinary papers before them, which they must have to deal with the matter of sentence, that that in some way invalidates the conviction. In my opinion, it does not. The papers have to go to the chairman, for a list is prepared of the cases. The applicant applied to the chairman for legal aid, and he naturally wanted to see the notes of evidence to see what the case was about before he decided to give legal aid, and I cannot see any reason why the notes of evidence should not be supplied to quarter sessions even when it happens, as in this case, that a person

As to appeals, the case of *R.* v. *Grimsby Borough Quarter Sessions, ex p. Fuller* [1955] Crim.L.R. 774, has caused some difficulty. All that we meant was that it was undesirable that, while trying an appeal, the justices should always have the notes taken below before them unless it became necessary to see what a witness had said or what had transpired in the court below. But we had not in mind that it may often be necessary for the chairman to have access to the notes before the hearing to enable him to decide an application for legal aid, to estimate the length of an appeal when he is settling the day's list and perhaps for other matters. This had in effect been said in the *Dorset* case. We hope therefore that clerks to justices will send their notes to the clerk of the peace when there is an appeal so that he can show them to the chairman or recorder if he requires them before the hearing for such purposes as those we have mentioned, and also give them to the court during the hearing if it becomes necessary or desirable for them to see what happened below.

Ormerod and Glyn-Jones JJ., who sat with me in the *Grimsby* case, agree with what I have just said, as does Byrne J., who is sitting with me today. [J. D. P.]

### *Publication of particulars of juvenile witnesses in proceedings arising out of any offence against or any conduct contrary to decency or morality*

Home Office Circular No. 18/1956 dated February 14, 1956

I am directed by the Secretary of State to say that he has received representations from the General Council of the Press about a number of cases in which newspapers have published the names and addresses of children or young persons who have given evidence in proceedings for sexual offences. Section 39 of the Children and Young Persons Act, 1933, provides that in any proceedings arising out of any offence against or any conduct contrary to decency or morality the court may direct that no newspaper shall reveal the name or other identifying particulars of any child or young person concerned in the proceedings. There

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sent forward for sentence wants to appeal against the conviction, because it often comes to a question whether a person has said something below which contradicts their evidence. . . . As a matter of practice and machinery, it is obvious that every justice who is sitting on the appeal must know at the same time that the appellant has been sent forward for sentence, and I am sure that justices can be trusted to try an appeal fairly. . . .

In this case the court cannot see any reason for saying that justice was not done, and this application fails and must be refused.

is thus a means of preventing publication whenever it is considered undesirable in the interests of the young witness. The Press Council are of the opinion, however, that this provision is not operating effectively because the attention of the court is not expressly drawn to its powers at the outset of every such case in which a child or young person is concerned. In some cases it would appear that the matter is not brought to the notice of the court at all; in other cases it is dealt with too late to prevent publication of particulars of the witness in the first reports of the proceedings.

The Secretary of State agrees with the Council that all practicable steps should be taken to ensure that full advantage is taken of the powers available, so that juvenile witnesses are protected where necessary and so that newspapers are in no doubt whether they may or may not publish identifying particulars. He accordingly suggests that, in all proceedings to which section 39 of the Children and Young Persons Act applies, the clerk to the justices should inform the court at the beginning of the case that a child or young person is concerned in the proceedings and remind the court that it may give a direction prohibiting the publication of identifying particulars. In order that the clerk may be aware in advance of those criminal cases to which the section is likely to apply, chief officers of police have been asked to inform him before the proceedings if it is intended to call juvenile witnesses to give evidence for the prosecution.

As regards proceedings for an indictable offence in which the accused person is committed for trial, the Secretary of State considers that it would be helpful to the superior court to be aware in advance of cases to which section 39 may apply. He would therefore also suggest that, when forwarding the depositions in this type of case to the proper officer of the court of trial, the clerk to the justices should as a matter of course enclose a statement showing that the attention of the examining justices had been drawn to the provisions of section 39 and that they did or did not give a direction prohibiting publication.

Similar considerations apply to proceedings on appeal from the decision of a magistrates' court and the Secretary of State has suggested to the police that in cases in which they are the respondents, they should inform the appeal committee or the court of quarter sessions at the beginning of the hearing whether a direction under section 39 was given in the proceedings before the magistrates' court.

# Summary Justice

### *Animals*

Bull. Permitting a bull to be at large in a field containing a public footpath; fined £1, ordered to pay 9s. 6d. costs; Catt: Rye Magistrates' Court (*Sussex Express and County Herald,* February 10).

Bird. Gamekeeper killing a tawny owl and setting a trap likely to cause injury to a wild bird; fined £3, ordered to pay £5 5s. costs; Claxton: Amersham Magistrates' Court (*Evening Standard,* February 27).

### *Assault*

Snowball. Student throwing snowball and hitting policeman; fined £1 for "wantonly discharging a missile, to wit a snowball, to the damage or danger of persons in Kensington Court"; Huggins: West London Magistrates' Court (*Evening Standard,* February 21).

### *Aviation*

Airline pilot taking off without ensuring that there was sufficient fuel aboard for the proposed flight and any other contingencies that might arise; fined £25, ordered to pay £5 5s. costs; company could not be prosecuted because it was registered in Jersey; Nedoma: Reading Magistrates' Court (*Evening Standard,* February 17).

Unauthorised landing. Flier making unauthorised landing at aerodrome in protest against airfield being used for motor-cycle racing; fined £70, ordered to pay £20 costs; Weininger: Wellingborough Magistrates' Court (*Northamptonshire Evening Telegraph,* February 24).

Low flying. Unlicensed pilot flew down to less than 1,000 ft. over Potters Bar to wave to a friend; fined £20; Gray: Barnet Magistrates' Court (*Manchester Guardian,* February 2).

### *Children*

Neglect. Parents leaving boy, aged fourteen, alone in flat for three weeks, supplied him with food and money; summons brought by N.S.P.C.C. against them for wilfully neglecting boy in a manner likely to cause unnecessary suffering or injury to health dismissed; £5 5s. costs awarded against prosecution; Gavin, Gavin: Clerkenwell Magistrates' Court (*Manchester Guardian,* February 6).

*Firearms, explosives and offensive weapons*

Air rifle. Two boys, aged 12 and 13½, using air rifle belonging to one of them summoned for carrying a gun without a licence; each fined 10s.: Norman Cross Juvenile Court (*Peterborough Citizen and Advertiser,* February 24).

*Highways*

Interrupting the free passage of the highway; driver stopping to ask policeman the way, opened car door and knocked passing cyclist from her machine; fined £3; Cartwright: Warrington Magistrates' Court (*Liverpool Evening Express,* February 17).

Fighting in street. Two boys taking part in running fight with others in the street; each fined £1 for fighting in the street to the annoyance of passers-by; Whitfield, Davison: Bootle Magistrates' Court (*Liverpool Evening Express,* February 24).

*Larceny, etc.*

Fraud. Corporation housing inspector attempting to obtain £3 a week from a city building contractor as a reward for giving him fictitious orders for repairs to corporation properties; sentenced to three months' imprisonment; Morris: Birmingham Magistrates' Court (*Birmingham Mail,* February 21).

Fraud. Civil servant attempting to obtain £72 by placing a bet on a two o'clock race after he had heard that there was a photo-finish and posting the slip in time to obtain two o'clock time stamp; asked for similar offence to be taken into consideration; fined £40, ordered to pay £3 9s. 4d. costs; Steadman: Warwick Magistrates' Court (*The Birmingham Mail,* February 17).

*Local by-laws*

Litter. Throwing newspaper on pavement after eating fish and chips; fined £2; White: Chatham Magistrates' Court (*Evening Standard,* February 8).

*Master and servant*

Coal mine. Deputy manager failing to look for traces of gas before a shift; fined £2; Needham: Castleford Magistrates' Court (*Yorkshire Post and Leeds Mercury,* February 9).

*National service*

Fine. Jehovah's witness refusing to pay £25 fine imposed for failing to submit to a national service medical examination; sentenced to three months at detention centre; Mills: Southend Magistrates' Court (*Evening Standard,* February 20).

### *Nuisance*

Telephone. Dismissed employee persistently making telephone calls to former employer's wife without reasonable purpose and causing annoyance; fined £5; Rose: Birmingham Magistrates' Court (*Birmingham Mail,* February 9).

### *Parks*

Skating on prohibited ice on a pond in Richmond Park and obstructing park keepers; fined £4; Gillett: Richmond Magistrates' Court (*Evening Standard,* February 20).

### *Railways and ships*

Wilful damage. Assistant steward committing wilful damage to panelling and paintings in *Queen Mary* while she was undergoing refit in dry dock; fined £20; Ford: Southampton Magistrates' Court (*The Daily Telegraph,* March 2).

### *Road traffic*

Two students driving away a police car without consent; each fined £5; Crouch, Oates: Brighton Magistrates' Court (*Evening Standard,* February 22).

Driving motor-vehicle without reasonable consideration for other road users. Man drove van fast past a pedestrian who was crossing the road and covered him with slush; fined £5; Jarvis: Cheshunt Magistrates' Court (*Yorkshire Evening Post,* February 15).

Two schoolboys, aged thirteen, riding two on a bicycle; each fined 5s.: Wallasey Magistrates' Court (*Liverpool Evening Express,* February 14).

Drunk in charge. Two policemen drunk in charge of a patrol car; each fined £20, ordered to pay £3 3s. costs and disqualified from driving for twelve months; Tomlinson, Watson: Birmingham Magistrates' Court (*The Times,* February 13).

Driving test. Application for a summons enabling man to take second driving test immediately; alleged that first test was unfair because it was taken on ice-covered roads; application dismissed because it was not alleged that test was unreasonable, only that conditions were unsuitable; Henefen: Stafford Magistrates' Court (*Birmingham Mail,* February 6).

Bus. Failing to pay extra 1½d. after travelling past fare stage; fined 10s.; magistrate gave warning that he would impose heavier penalties in future in such cases; Cole: Liverpool Magistrates' Court (*Liverpool Evening Express,* February 14).

*Suicide*

Attempted suicide. Man who attempted suicide sent to prison for six months "for his own protection"; White: Birmingham Stipendiary Magistrates' Court (*Birmingham Mail,* February 23).

# Case and Comment

The reports of cases to which initials are appended hereunder have been specially prepared for *The Criminal Law Review* by the following reporters:—

HENRY PALMER, *Barrister-at-Law.*
J. D. PENNINGTON, *Barrister-at-Law.*

**Accessory**—*Accessory after the fact—evidence—motive*

R. *v.* POWELL [1] (Court of Criminal Appeal: Lord Goddard C.J., Hilbery and Byrne JJ.: February 13, 1956).

P. was tried at Gloucester Sessions on an indictment containing eight counts. He was acquitted on the first seven counts, which were charges of housebreaking, larceny and receiving stolen property, and was convicted on the eighth in which he was charged with being an accessory after the fact. The facts, shortly, were that a woman named R. was engaged in stealing property from a house, and P. accompanied her on several expeditions when property was sold. Ultimately, when they were together in the house, someone knocked on the door, whereupon P. said that he was going because he was on licence from Borstal and did not want to be caught. P. then left the house and R. followed him. P. appealed to the Court of Criminal Appeal against his conviction on the charge of being an accessory after the fact on the ground that, having regard to the verdicts on the other counts, there was no evidence to support the conviction.

*Held,* allowing the appeal, that an accessory after the fact is a person who, knowing that another has committed a felony, assists that person in order to hinder his apprehension. The evidence here showed perfectly plainly that P. was merely taking steps to evade his own arrest. It was quite obvious that, having regard to the way the case was conducted and the verdicts on the other counts, there was no evidence to support the last count of being an accessory after the fact. The conviction would, therefore, be quashed. [H. P.]

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[1] For the appellant: *Miss L. J. Griffiths* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *B. T. Neill* (instructed by Wellington & Clifford, Gloucester).

COMMENTARY. This case follows *R.* v. *Jones* (1948) 33 Cr.App.R. 33, where the Court of Criminal Appeal held that where a man was charged with being accessory after the fact to the receiving of stolen property by his wife, the judge should have specified the acts alleged to have been done by the appellant for the purpose of assisting his wife to escape conviction, and should have specifically directed the jury that if the motive in the mind of the appellant was merely a desire to avoid his own arrest, that would not be sufficient to bring him within the purview of the charge.

See Archbold, 33rd ed., 1507.

**Affidavit**—*Cross-examination on.* See R. *v.* STOKESLEY, YORKS., JUSICES, *ex p.* BARTRAM, p. 259, below.

**Certiorari**—*Order for restitution of property.* See R. *v.* UXBRIDGE JUSTICES, *ex p.* LOGAN, p. 270, below.

**Children and Young Persons**—*Employment of child under fourteen —evidence*

GILMAN *v.* EVANS [2] (Q.B., Divisional Court: Lord Goddard C.J., Stable and Ashworth JJ.: January 17, 1956).

Informations were preferred against a parent for permitting a boy under the age of fourteen years to deliver newspapers, contrary to certain by-laws, and also against two tradesmen who employed the boy. When first seen about the matter, the defendants raised no question. Before the justices a police officer who had seen the boy was called and a birth certificate was produced, but counsel on behalf of the defendants submitted that there was no proof of the age of the boy and that the prosecution had failed to identify the child named in the birth certificate with the one seen by the police. The justices accepted that submission, and dismissed the information. On appeal by the prosecution:—

*Held,* allowing the appeal, that the justices had been led to a decision which could not possibly be upheld and the case must be sent back to the justices with a direction that there was sufficient evidence.

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[2] For the prosecution: appellant: *H. G. Talbot* (instructed by Kingsford, Dorman & Co. for D. G. Gilman, Derby). The respondents were not represented and did not appear.

The court had more than once said that advocates appearing before lay justices should be careful not to take points which they would not take before a judge or the Divisional Court, and, in the present case the only result was that the defendants, who might have escaped with a light fine or a conditional discharge, would have to pay the costs.

[Miss J. F. Lamb, *Barrister-at-Law.*]

COMMENTARY. A birth certificate is evidence of the date of birth of the person to whom it refers (*Re Goodrich* [1904] P. 138), but if it is sought to prove the age of anyone by the production of such a certificate independent evidence must be given identifying that person with the person named in the certificate (*R.* v. *Rogers* (1914) 10 Cr.App.R. 276). There is no statutory requirement that age must be proved by the production of a birth certificate, coupled with evidence of identity, and it may be proved by any lawful evidence. Where an officer of the N.S.P.C.C., a police constable and a school mistress gave evidence that they had seen certain children and believed them to be under the age of sixteen, this was held to be sufficient proof of their age: *R.* v. *Cox* [1898] 1 Q.B. 179.

### **Court of Criminal Appeal**—*Appeal—abandonment of—renewal of appeal*

R. *v.* HEALEY [3] (Court of Criminal Appeal: Lord Goddard C.J., Hilbery and Byrne JJ.: February 13, 1956) (*The Times,* February 14, 1956).

H., who was a squadron leader in the Royal Air Force, was convicted at Chester Assizes of wounding his wife with intent to murder her, and was sentenced to five years' imprisonment. On January 16, 1956, H.'s application for leave to appeal against his sentence was allowed by the Court of Criminal Appeal (consisting of Lord Goddard C.J., Stable and Ashworth JJ.), and the court stated that the appeal would be heard on January 23. On January 18, 1956, H. gave notice of abandonment of his appeal. He now applied to the Court of Criminal Appeal for leave to withdraw the abandonment of his appeal. It was submitted on behalf of H. that as there were special circumstances and the applicant was labouring under a misapprehension or mistake of fact, then the court should allow the application. The court examined an affidavit by the applicant's solicitor who saw him after he had sent in the notice. H. had read the report of the application in *The Times* on January 17, and as a result had formed the view that the facts that he was suffering under mental stress and the appalling conduct of his wife, were not proper grounds for taking a merciful view. He had consulted his solicitor on January 18, after the notice of abandonment had been dispatched and his solicitor had advised him to continue the appeal. H.'s state of mind was such that he could not tolerate the anxiety of five days more until the appeal was to be heard. The appeal clearly had merit and gave rise to issues worthy of consideration.

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[3] For the applicant: *Elwyn Jones Q.C., Peter Thomas* (instructed by J. E. Shaw & Co., Stockport). The Crown was not represented.

*Held*, dismissing the application, that the court had power to allow a withdrawal of abandonment where there were special circumstances or where, as Avory J. said in *R.* v. *Van Dyn* (1932) 23 Cr.App.R. 150, there was "some misapprehension or some mistake of fact." Here, H. had weighed up the advantages and disadvantages of continuing his appeal, and had then deliberately abandoned it. Prisoners were told on the cell card that notice of abandonment amounted to a dismissal of the appeal. It appeared, from the affidavit of H.'s solicitor, that H. had formed the view that, if the appeal was heard, he ran the risk of being detained during Her Majesty's pleasure, and that his past service record and past medical history had no bearing in mitigation, and that he felt he could not endure the five days' mental strain until the hearing. H. was perfectly entitled to decide to abandon his appeal, but as he had weighed up the advantages and disadvantages, the court could not say that there were special circumstances which would enable them to reconsider the abandoned appeal. The court were of opinion that "misapprehension or mistake" meant some misapprehension as to what had happened with regard to the appeal or notice of appeal; it did not mean that, if a prisoner who had decided to abandon his appeal, was then advised that that was unfortunate, that that amounted to misapprehension. The application would, therefore, be refused. [H. P.]

COMMENTARY. In *R.* v. *Sloan and Waddington* (1923) 39 T.L.R. 173 Salter J. said: "It is not desirable, nor even possible, to enunciate in what circumstances an application for leave to withdraw a notice of abandonment of an appeal will be acceded to. But there must be special circumstances." Such circumstances were not found to exist where an appellant gave notice of abandonment because he thought that as his friends were unable to assist him financially it was impossible for him to continue with his appeal as he desired: *R.* v. *Pitman* (1916) 12 Cr.App.R. 14; nor where an appellant abandoned his appeal on the receipt of a letter from one of the witnesses he wished to call who said that if she gave evidence she would lose her post and her mother would go mad: *R.* v. *Van Dyn* (1932) 23 Cr.App.R. 150.

The Court of Criminal Appeal has a discretionary power to act upon evidence by affidavit: Criminal Appeal Act, 1907, s. 9; R.S.C., Ord. 58, r. 4. It has done so when hearing an appeal, but the circumstances in the present case are unusual. In *R.* v. *Hancox* (1913) 8 Cr.App.R. 176, on an application for leave to appeal the court required witnesses who had made affidavits to be in court and to be prepared to give evidence if required. In that case Darling J. said of evidence by affidavit that the Court of Criminal Appeal will not as a rule pay much regard to it unless an opportunity has been given to the other side to cross-examine the deponent. In *R.* v. *Thomas* (1933) 24 Cr.App.R. 91, on an appeal against conviction the court refused to look at affidavits by two Welsh jurors alleging that they did not understand the English language sufficiently to enable them to follow the proceedings, but the reason for this refusal was that after a verdict evidence may not be given " as to what was passing in the mind of the particular juryman or as to what took place in the jury room ": *Raphael* v. *Bank of England* (1855) 4 W.R. 10.

**Divisional Court**—*Affidavits—Cross-examination on affidavits*

R. *v.* STOKESLEY, YORKS, JUSTICES, *ex p.* BARTRAM [4] (Q.B. Divisional Court: Lord Goddard C.J., Hilbery and Devlin JJ.: February 15, 1956) ([1956] 1 W.L.R. 254; [1956] 1 All E.R. 563).

In 1947, justices made an affiliation order against B. who did not appear. On January 25, 1956, B. applied to the Divisional Court for an order of certiorari to quash the order of 1947 on the ground that no summons had been served on him to appear before the justices and that, having no knowledge that proceedings were taking place, he had not appeared and that the justices had no jurisdiction to make the affiliation order. Affidavits by B., by a police constable, who said that he had served the summons, and by the justices, were before the court. There was also the original order made by the justices on which the printed words " [the appearance of the defendant] " had been struck out. The court, being satisfied that the summons had been served, dismissed the application. The court was then informed that the words " [the appearance of the defendant] " had not been struck out at the time when it was originally drawn up, but between the time when it had been inspected by B.'s solicitor and when it was placed before the court. The court thereupon directed a re-hearing. At the re-hearing it transpired that the alteration had been made by the acting clerk to the justices when preparing the documents to be put before the Divisional Court. When the case came on for hearing counsel on either side applied for leave to cross-examine on the affidavits.

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[4] For the applicant: *A. J. Irvine* (instructed by R. A. Rotherham & Co. for Pearsons & Ward, Helmsley, Yorks). For the justices: *Alan Garfitt* (instructed by Torr & Co. for W. Lowther Carrick & Co., Stokesley, Yorks).

*Held,* that power was given to the court by R.S.C., Ord. 38 and Ord. 59, r. 47, to allow cross-examination on affidavits in Crown proceedings, and although the power would only be exercised in very special circumstances, in view of the exceptional character of the present case, leave would be given.

The court having heard evidence, and being satisfied that the summons had in fact been served on B., dismissed the application. Regarding the alteration of the order, the court adjudged that the acting clerk was guilty of contempt of court, but since his action was possibly due to inexperience he would be ordered to pay the extra expense caused as an alternative to a writ of attachment being made against him. [J. D. P.]

**Evidence**—*Accessory after the fact.* See R. *v.* POWELL, p. 255, above.

**Evidence**—*Age of child.* See GILMAN *v.* EVANS, p. 256, above.

**Evidence**—*Inducing investment by false statement.* See R. *v.* MOORE, p. 264, below.

**Evidence**—*View of locus in quo—evidence of witnesses*

KARAMAT *v.* R.[5] (Judicial Committee of the Privy Council: Lords Goddard, Tucker and Somervell of Harrow: January 24, 1956) ([1956] 2 W.L.R. 412; [1956] 1 All E.R. 415).

During a trial for murder in British Guiana, where the procedure in criminal trials is similar to that in England, the judge directed a view of the *locus in quo.* At the view witnesses who had already given evidence were present and any juror who wanted to ask a question put it through the judge who was present throughout and had control of the proceedings. A witness would demonstrate his answer, counsel being invited by the judge to ask questions through him. No cross-examination was allowed, but the judge said counsel would have full opportunity to recall witnesses and cross-examine them. On appeal by the accused against conviction:—

*Held,* dismissing the appeal, that a witness who had already given evidence was entitled to attend the view, which was part of the evidence and was in substitution for or supplemental to plans, photographs, etc. So long as the witnesses taking part were recalled to be cross-examined, if desired, the accused was not in any way prejudiced, but every effort should be made to see that witnesses did not communicate with the jury except to give a demonstration. On such occasions it was highly desirable that the judge should be present. [J. D. P.]

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[5] For the appellant: *Bernard Gillis Q.C., J. Lloyd-Eley* (instructed by Hy. S. L. Polak & Co.). For the Crown: *J. G. le Quesne* (instructed by Charles Russell & Co.).

COMMENTARY. In English criminal trials views of the *locus in quo* are rare, but the judge always has a discretion to grant such a view. In *R.* v. *Whalley* (1847) 2 C. & K. 376, it was held that such a view might be allowed without the consent of the prosecution " if it is wished on the part of the prisoner . . . and the place be so near to the court that the jury can have the view without inconvenience." In *R.* v. *Martin* (1872) L.R. 1 C.C.R. 378, a view of the *locus in quo* permitted after the judge had summed-up did not invalidate the trial.

See Archbold, 33rd ed., 196.

### **False Imprisonment**—*Justices acting outside their jurisdiction—limitation of action*

O'CONNOR *v.* ISAACS [6] (Queen's Bench Division: Diplock J.: January 24, 1956) ([1956] 2 W.L.R. 585; [1956] 1 All E.R. 513).

In 1941, O. was ordered by justices to pay maintenance to his wife and child. This order was varied from time to time by other justices and terms of imprisonment were imposed for non-compliance. The last term of imprisonment occurred in 1945. In 1954, O. appealed to the Divorce Divisional Court against the orders for maintenance and they were quashed. In an action by O. against ten justices, including three who had made the original order, for damages for false imprisonment and for acts done by them without jurisdiction while sitting as justices, it was conceded that the justices had no jurisdiction to make the original order to pay maintenance.

*Held,* (1) that at common law an action for trespass would lie against justices acting without jurisdiction and therefore an action for false imprisonment; (2) that there was no cause of action for the money paid by O. pursuant to the order, and that no new cause of action for the money to be repaid was created by the Justices Protection Act, 1848, which did not previously exist at common law. Therefore action would only lie against the three justices who made the original order. But (3) the proviso to section 2 of the Act of 1848 provides that no action shall be brought for anything done under a conviction or order until such conviction has been quashed. The plaintiff's action therefore accrued in 1945 at the date of the last imprisonment and not in 1954 when the order of 1941 was discharged, because the latter order was not a "conviction" and it was not therefore necessary for it to be quashed before an action could be brought. The action was barred by section 21 of the Limitation Act, 1939, and, accordingly O.'s claim against all the justices failed. [J. D. P.]

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[6] For the plaintiff: *N. R. Fox-Andrews Q.C., R. L. Bayne-Powell* (instructed by George C. Carter & Co.). For the justices: *G. G. Baker Q.C., David Wacher* (instructed by Wilkinson, Howlett & Moorhouse).

COMMENTARY. The Limitation Act, 1939, s. 21, was repealed by the Law Reform (Limitation of Actions, etc.) Act, 1954. This, however, does not affect the main point of the case which concerned the date at which the defendant's cause of action accrued. In cases of false imprisonment the imprisonment is the cause of action and the action must be brought within six years of the date of that imprisonment. The fact that the prisoner did not know his imprisonment was false until the original order was quashed did not constitute an exception to this rule.

**Food and Drugs**—*Bread—deficiency in weight of loaves*

JENKINS *v.* W. J. BROOKES & SONS[7] (Q.B. Divisional Court: Lord Goddard C.J., Stable and Ashworth JJ.: January 12, 1956).

An information was preferred against the defendants, a firm of bakers, that they sold seventeen loaves of bread which were not of the weight of 14 oz. contrary to article 3 of the Bread Order, 1953. At the hearing before the justices the only witness called for the defence was the general manager of the defendants' factory where the loaves were baked, who described the procedure adopted for measuring the quantity of dough for each loaf, for checking the quantity at frequent intervals to detect errors and for general supervision. He stated, however, that he was not present at the baking of the loaves on the night in question, that he had no proof that the standing instructions to the foreman were carried out or that any particular employee saw them. The justices were of opinion that as a foreman was in attendance at all times to whom checking instructions were given, the defendants had exercised diligence to prevent the occurrence of errors, and that in accordance with article 3 (2) (*b*) of the Order of 1953 they should be discharged. The prosecutor appealed.

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[7] For the prosecutor: *J. F. Bourke* (instructed by Sharpe, Pritchard & Co. for T. H. Evans, Stafford). For the defendants: *Gerald Thesiger Q.C.*, *C. N. Glidewell* (instructed by Church, Adams, Tatham & Co. for Cobbett, Wheeler & Cobbett, Manchester).

*Held,* allowing the appeal, that there being no evidence to show that the deficiencies were due to a mistake or accident, there was nothing on which the justices could find that the defence was made out, and therefore the defendants were guilty of an offence.

[J. D. P.]

COMMENTARY. The Order creates an offence of strict responsibility, *i.e.,* one in which the necessity for *mens rea* is excluded. The wording of the defence provided in it, that the deficiency was due " to a bona fide mistake or accident, or to other causes beyond [the accused's] control, and that it occurred in spite of all reasonable precautions being taken and all due diligence being exercised by him to prevent its occurrence," is the same as that contained in section 12 (2) of the Sale of Food (Weights and Measures) Act, 1926, to proceedings under that Act. In *A. Walkling* v. *Robinson* (1929) 46 T.L.R. 151, a case arising under that section, it was held that the section was to be read conjunctively and until bona fide mistake or accident or other cause beyond the appellants' control was proved the words " all reasonable precautions " and " due diligence " could not be considered.

### **Food and Drugs**—*Unfit for human consumption—bread with dirty bandage adhering to it*

CHIBNALL'S BAKERIES *v.* COPE-BROWN [8] (Q.B. Divisional Court: Lord Goddard C.J., Hilbery and Stable JJ.: January 30, 1956) (*The Times,* January 31, 1956).

A firm of bakers were convicted of unlawfully selling a loaf of bread which was intended, but was unfit for human consumption, contrary to section 9 of the Food and Drugs Act, 1938. The justices found that the loaf had part of a used and dirty bandage adhering to the bottom crust of the loaf.

*Held,* dismissing the appeal and distinguishing *J. Miller* v. *Battersea Borough Council* ([1955] Crim.L.R. 779), that the defendants were rightly convicted under section 9 of the Act. [J. D. P.]

COMMENTARY. Recently the Divisional Court has held that a piece of metal in a chocolate cream bun and a piece of string in a loaf of bread did not render the bun or the loaf unfit for human consumption under section 9 of the Food and Drugs Act, 1938 (*J. Miller* v. *Battersea Borough Council, Turner & Son* v. *Owen* [1955] Crim.L.R. 779). The ground for distinguishing the present case seems to have been the potentially toxic nature of the extraneous matter.

Mr. J. C. Smith at [1956] Crim.L.R. 101 criticises the reasoning of the court in *Miller's* case.

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[8] For the defendants: *James Burge* (instructed by Claude Barker & Partners). For the prosecutor: *W. G. Wingate* (instructed by E. J. Cope Brown).

**Fraud**—*Prevention of—inducing investment by false statement—evidence*

R. *v.* Moore[9] (Court of Criminal Appeal: Lord Goddard C.J., Hilbery and Byrne JJ.: February 27, 1956) (*The Times*, February 28, 1956).

M. was tried with D. and T. at Manchester Assizes in respect of certain offences under section 12 (1) of the Prevention of Fraud (Investments) Act, 1939. M. was the manager of a branch of Barclays Bank. D. was a builder and a customer of M. at the bank. T. was an accountant. When D.'s financial position became very bad, it was suggested to a financier that some additional capital ought to be found. Ultimately the financier put up £40,000 as additional capital for D.'s business, most of which he lost when the business failed. There were three counts in the indictment which concerned M., namely (i) that he fraudulently attempted to induce the investment of money by a false statement that D.'s business had a hidden reserve of £9,000 which was not shown on the balance-sheet; (ii) that he fraudulently induced the investment of money by falsely forecasting that certain sums of money would be paid to D. in respect of progress work, retentions and increased costs; and (iii) that he recklessly attempted to induce the investment of money by the reckless making of a false statement, namely, that an investment in D.'s business was a good investment. M. was acquitted on the first two counts and convicted on the third. M. appealed to the Court of Criminal Appeal against his conviction on the ground that there was no evidence to support the conviction. The highest at which the prosecution case could be put was that M. had told the financier that if he (the financier) came into the business and managed it and brought in a large amount of capital, then that would be a good investment.

*Held*, allowing the appeal, that the evidence did not support the conviction. Of course, if M. had been convicted on the first two counts he would clearly have been guilty of inducing the investment of money by representing that the investment was a good investment; but M. had been acquitted by the jury of making the specific statements alleged in those counts. One could not say on the evidence here that there was a definite representation by M. that the business was a good investment. What was said by M. was that the business was a good investment if the financier came into the business and undertook the finance and direction of it and found fresh capital. In the circumstances the court were of opinion that the conviction ought to be quashed because the evidence did not support the count. [H. P.]

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[9] For the appellant: *Leonard Caplan Q.C., C. N. Glidewell* (instructed by David Blank, Alexander & Co., Manchester). For the Crown: *Fenton Atkinson Q.C., C. T. B. Leigh* (instructed by the Director of Public Prosecutions).

COMMENTARY. Section 12 (1) of the Prevention of Fraud (Investments) Act, 1939, provides that "any person who, by any statement, promise or forecast which he knows to be misleading, false or deceptive, or by any dishonest concealment of material facts, or by the reckless making of any statement, promise or forecast which is misleading, false or deceptive, induces or attempts to induce another person" to invest money shall be guilty of an offence. In *R.* v. *Russell* [1953] 1 W.L.R. 77, Donovan J. distinguished between the three categories of offences with which this section deals: (1) the person made a statement which he knew to be misleading, false or deceptive; (2) the person dishonestly concealed material facts; (3) the person recklessly made a statement or forecast which was misleading, false or deceptive. The first two categories referred to persons who were dishonest, the third to cases where there was a high degree of negligence but no dishonesty. Alternative counts could lie in the same indictment charging the offences of dishonesty and that of recklessness, as in the present case. In the Court of Criminal Appeal, Lord Goddard C.J. said *obiter* that he agreed with Donovan J.

### **Highways**—*Artist displaying pictures on footway—notice to remove them*

PILONE *v.* GARDINER [10] (Q.B. Divisional Court: Lord Goddard C.J., Stable and Ashworth JJ.: January 20, 1956) (*The Times*, January 21, 1956).

On June 18, 1955, P., an artist, placed pictures on the footway in a street in Hampstead. He was served with a notice by the borough surveyor on behalf of the borough council requiring him to remove the pictures immediately. At 2 p.m. on the same day they were still there. On a charge under section 65 of the Metropolitan Paving Act, 1817, it was contended for P. that the section was designed to prevent nuisance and annoyance in the street and, since it was admitted that no nuisance or annoyance had been caused, no offence had been committed. The justices were of opinion that P. had committed an offence and that evidence relating to street trading licences granted to persons other than P., and to his unsuccessful attempts to obtain a licence were irrelevant. Accordingly, they convicted him and fined him 10s. On appeal:—

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[10] For the appellant: *Miss M. Viner* (instructed by S. Sydney Silverman). For the borough council: *Stanley Rees* (instructed by P. H. Harrold).

*Held,* dismissing the appeal, that the justices having found that the notice served was a good notice, they were entitled to convict.

[J. D. P.]

**Larceny**—*Farm gate—whether attached to and forming part of realty*

R. *v.* Skujins[11] (Oxford County Quarter Sessions: His Honour Sir Donald Hurst, Chairman: January 3, 1956).

S. pleaded not guilty to stealing a farm gate. The evidence was that pieces of wood, being part of a gate, were found being made into a shed by the accused. S. denied that the pieces of wood were part of the stolen gate, though he admitted that they were part of a gate which, he said, was obtained by purchase. At the close of the case for the prosecution, counsel for S. submitted that there was no case to answer on the ground that, even if the gate found in S.'s possession was the missing gate, a farm gate was a thing attached to and forming part of the realty within the meaning of the proviso to section 1 (3) of the Larceny Act, 1916, and was, therefore, not a thing capable of being stolen. The degree of annexation must be taken into account; and where the thing was merely resting on the land by reason of its own weight, as here, the burden of proof is on the accused to show that it is part of the land (*Holland* v. *Hodgson* (1872) L.R. 7 C.P. 328). The object of annexation must be looked at in order to ascertain whether the annexation was for the more convenient use of the chattel or for the more convenient use of the land (*Hellawell* v. *Eastwood* (1851) 6 Exch. 295). Here the object of annexation was clearly for the purpose of making more convenient use of the land.

*Held,* that there was no case to answer. The object of annexation was such as to satisfy the court that the gate formed part of the land within proviso (*a*) to section 3 (1) of the Larceny Act, 1916, and was not, therefore, a thing capable of being stolen.

[H. P.]

Commentary. The interpretation of the proviso to section 1 (3) of the Larceny Act, 1916, was considered in *Billing* v. *Pill* [1954] Crim.L.R. 58, where it was held that an army hut, the floor of which had been secured to a concrete base by bolts, did not fall within the proviso. There Lord Goddard C.J. said that the words " anything attached to or forming part of " might be read as meaning " attached so as to form part," and applied the same principles as those considered in civil cases concerning attachment to realty, as was done in the argument in the present case. An alternative view was put by Mr. J. C. Smith in an article at [1955] Crim.L.R. 404, where he suggested that the proviso should be interpreted as excluding from the law of larceny two types of property, namely, property attached to the realty or property forming part of the realty. Applying either test the farm gate would seem to be excluded from the law of larceny.

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[11] For the accused: *J. E. M. Irvine* (instructed by Ravenor, Batt & Lee, Witney). For the Crown: *Philip Bowles* (instructed by Cole & Cole, Oxford).

**Larceny**—*Information—misdescription of ownership—validity*

R. *v.* RODGERS[12] (Nottinghamshire Quarter Sessions Appeal Committee: T. R. Fitzwalter Butler Esq., Chairman: February 22, 1956).

On January 16, 1956, the defendant was convicted by the magistrates on an information charging him with stealing a quantity of copper cable and two electric junction boxes, of the total value of £25, the property of Her Majesty's Secretary of State for War, and was sentenced to six months' imprisonment. He appealed against conviction, and at the hearing before the Appeal Committee of Nottinghamshire Quarter Sessions a police-officer was called on behalf of the respondent, who stated that he had found the property named in the information in the appellant's van, and that the appellant had told him that he had found it on a roadside dump, to which he subsequently took the police-officer. Evidence was also given by an employee of the Air Ministry, who stated that the property was in good condition and of the value of £25; that it was exactly similar to property issued to Fillingley Aerodrome; that the junction boxes bore the same serial number as those issued to the aerodrome; and that property of this kind would not be abandoned by the Air Ministry. At the close of the respondent's case, counsel for the appellant submitted that he had no case to answer, in that there had been a misdescription of ownership in the information and conviction, the property having been laid in Her Majesty's Secretary of State for War, whereas the evidence for the prosecution had all been directed to proving that the property lay in Her Majesty's Secretary of State for Air; and he contended that this misdescription, not having been amended before conviction, rendered the information and conviction invalid. Counsel for the respondent invited the Appeal Committee to consider the question of amendment, and also referred them to the decision of *Hibbert* v. *McKiernan* [1948] 2 Q.B. 142.

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[12] For the appellant: *M. V. Argyle* (instructed by Clay, Allison & Clark, Retford). For the respondent: *D. M. Cowley* (instructed by Hodgkinson & Beevor, Newark).

The Chairman, announcing the decision of the Appeal Committee on the submission, said that the decision in *Meek* v. *Powell* [1952] 1 K.B. 164, precluded the committee from allowing an amendment of the information or conviction at that stage; but that, while the committee was not prepared to say that in no case could a misdescription with regard to ownership be sufficient to invalidate an information and conviction based on it, in the present case they were satisfied that the misdescription did not have that effect, in that it was not calculated to mislead the defendant or embarrass him in his defence. They, therefore, overruled the submission.

Evidence was then given by the appellant and his wife, and the committee dismissed the appeal and affirmed the conviction and sentence.

[T. R. Fitzwalter Butler, *Barrister-at-Law*.]

COMMENTARY. Except when required for the purpose of describing an offence depending on any special ownership of property it is not necessary to name the person to whom the property concerned belongs in an indictment: Indictments Act, 1915, Schedule, r. 6. In *Hibbert* v. *McKiernan* [1948] 2 K.B. 142, a man was charged with stealing lost golf balls from the private links of a golf club. It was argued that the balls were not capable of being stolen since they had no owner who could be deprived of them, but this objection was overruled. Lord Goddard C.J. said that any difficulty might have been avoided by describing the balls as the property of persons unknown and added "at the present day allegations concerning the ownership of stolen property are, except in a few exceptional cases, treated as immaterial."

In *Meek* v. *Powell* it was held that quarter sessions when hearing an appeal from a conviction by a magistrates' court had power to amend an information only in cases where the latter had that power and a magistrates' court could not do so when once it had recorded a conviction on the information.

### **Larceny**—*Intent—time of—wrongful appropriation of extra money in wages packet*

MOYNES *v.* COOPPER [13] (Q.B. Divisional Court: Lord Goddard C.J., Hilbery and Stable JJ.: February 3, 1956) ([1956] 2 W.L.R. 562; [1956] 1 All E.R. 450).

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[13] For the prosecutor: *Edward Gardner* (instructed by Sharpe, Pritchard & Co. for R. P. Tunstall, Maidstone). The defendant did not appear and was not represented.

M., a labourer, asked his employers to make him an advance in pay, which they did. On pay day the wages clerk in error handed to M. a pay packet containing his full wages, not taking into account the advance which had been made. At the time when he received the pay packet, M. did not know that it contained more than was due to him, and he did not find out how much he had been paid until he got home and opened the packet. Having discovered that he had been overpaid he then decided to keep the whole of the contents of the packet. On a charge under section 2 of the Larceny Act, 1916, of stealing the overpayment, the property of his employers, the justices convicted him. The conviction was quashed by quarter sessions and the prosecutor appealed.

*Held* (Stable J. dissenting) that since at the time of receiving the pay packet from the wages clerk M. did not know that it contained an overpayment, he had not " taken " the money within section 1 (2) (i) (*c*) of the Act of 1916, and, therefore, although he was guilty of grave dishonesty, he was not guilty of larceny.

[J. D. P.]

COMMENTARY. Under the Larceny Act, 1916, s. 1 (2) (i) (*c*), taking in larceny includes obtaining possession " under a mistake on the part of the owner with knowledge on the part of the taker that possession has been so obtained." The courts have interpreted this as codifying the common law stated in *R.* v. *Middleton* (1873) L.R. 2 C.C.R. 38, in which case a post office clerk by mistake paid the prisoner the wrong amount of money on a warrant; the prisoner picked it up knowing the clerk's mistake and he was found guilty of larceny. Because of this it has been held, as it was in the present case, that the actual taking must be *animus furandi*. A decision to the contrary, *R.* v. *Ashwell* (1885) 16 Q.B.D. 190, is of doubtful authority because the bench was equally divided. There the prisoner asked for the loan of a shilling and was given a coin which both parties believed to be a shilling. The prisoner later discovered that the coin was a sovereign and then decided to keep it. He was found guilty of larceny. For a detailed examination of these two cases, see Russell on *Crime*, 10th ed., 1148 *et seq*. The more recent case of *R.* v. *Hudson* [1943] K.B. 458, was distinguished in the present case. There a letter containing a cheque was delivered by mistake to the prisoner, who received it innocently, but subsequently opened it and appropriated it. He was convicted of larceny.

Stable J. considered that following *R.* v. *Middleton*, the pay clerk had no authority to pass the possession, and therefore the accused did not take the money with the consent of the owner, and that as the actual receipt of the pay packet and the defendant's actual decision to keep the money should be considered as one transaction, the accused was guilty of larceny.

See Archbold, 33rd ed., 555.

This case will be considered in an article in a future issue of the *Review*.

**Larceny**—*Restitution of property—property in hands of third party*

R. *v.* UXBRIDGE JUSTICES, *ex parte* LOGAN [14] (Q.B. Divisional Court: Lord Goddard C.J., Hilbery and Stable JJ.: January 25, 1956).

The applicant bought a motor-car from dealers who, in their turn, had bought it from one X. X pleaded guilty to the larceny of the motor-car and the justices made an order that the car be returned to the original owners. The applicant applied for an order of *certiorari* to quash the restitution order on the grounds that he was not present when the order was made, and that there had been a denial of natural justice in that, since the order deprived him of a piece of property of which he was in possession, he should have been served with notice of the proceeding and should have been given an opportunity of being heard.

*Held*, dismissing the application, that the effect of section 45 of the Larceny Act, 1916, was that, on conviction of the thief, the conviction *ipso facto* revested the property in the owner; that the justices had power to order summary restitution; and that, if the applicant could establish a right, he was not prejudiced by the order if the matter were brought before the courts in an action. Since the justices had power to make the order as soon as they had convicted, *certiorari* would not lie, for the justices were acting within their jurisdiction, and there was no authority for the proposition that they were bound to find out where the property was and give the person or persons in possession of it at that moment the right to come before them and argue the question of ownership. Although the justices had no power to try the issue as to ownership, if it were thought desirable such a person, if he wished, should be given an opportunity to be heard by the justices. No doubt, in such a case, if there was a serious question as to ownership, the justices would refuse to make the order.

[Miss J. F. Lamb, *Barrister-at-Law*.]

COMMENTARY. The Larceny Act, 1916, s. 45 (1), provides that where a person guilty of larceny is prosecuted to conviction by or on behalf of the owner of the property stolen "the property shall be restored to the owner or his representative." Restitution ordered against a bona fide purchaser for value is based on the principle that a buyer from a thief can acquire no better title in the goods than that of the thief who purported to sell them. Only the court before which an offender is convicted can order restitution: *R.* v. *Mayor of London* (1869) L.R. 4 Q.B. 371.

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[14] For the applicant: *Alan Lipfriend* (instructed by Lieberman, Leigh & Co. for Saffman & Co.). For the original owners: *Gilbert Rountree* (instructed by Collyer-Bristow & Co. for Bird & Lovibond, Uxbridge).

See also Archbold, 33rd ed., 305; Stone, 86th ed., 285.

**Local Government**—*Member of council—pecuniary interest*

D. P. P. *v.* EDWARDS[15] (Woodbridge Magistrates' Court: Sir Charles Bunbury, Chairman: January 5, 1956).

The defendant, the chairman of the Woodbridge Urban Council, was charged with taking part in a discussion on a matter in which he had a pecuniary interest without disclosing that interest. He was the owner of certain houses which together with a number of others were the subject of a slum clearance report. The report was discussed on three separate occasions, but at no time were specific properties under examination. The defendant denied that he had any pecuniary interest in the report and said that if his financial interest had become a matter of discussion, he would have declared it.

*Held,* the defendant was guilty. He was fined a total of £80 and ordered to pay £18 5s. costs.

[L. M. Symes, *Clerk to the Justices.*]

**Magistrates' Courts**—*Appeals and committals to quarter sessions*

See PRACTICE NOTE, p. 249, above.

**Malicious Prosecution**—*False evidence by police*

SAM *v.* CLUNEY[16] (Queen's Bench Division: Cassels J. and a jury: February 2, 1956) (*The Times,* February 3, 1956).

The plaintiff, a British subject from Singapore, entered a station lavatory where two railway constables were keeping observation. They had concealed themselves in a water closet and were observing that part of the lavatory, known as the stalls, through a crack at the top of the door. A minute after the plaintiff entered the lavatory, the two police officers emerged and told him and another man that they had seen them kissing and behaving grossly indecently with each other. The plaintiff denied the accusation. He was arrested and taken to the police station and the following day the police officers preferred a charge against him of having committed an act of gross indecency; he was committed to quarter sessions, where the police officers gave evidence, and he was acquitted. The plaintiff now claimed against the police officers damages for false imprisonment, malicious prosecution and conspiracy to injure him by agreeing together on a statement to be made containing false allegations in respect of the charge and by agreeing that both of them should give false evidence at the trial.

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[15] For the prosecution: *M. J. Jardine* (instructed by the Director of Public Prosecutions). The defendant was not represented.

[16] For the plaintiff: *G. D. Roberts Q.C., Malcolm McGougan* (instructed by Gordon Gardiner, Carpenter & Co.). For the police constables: *Tristram Beresford Q.C., Ronald Hopkins* (instructed by Ponsford & Devenish). For the London Transport Executive: *Humfrey Edmunds* (instructed by M. H. B. Gilmour).

Cassels J. in his summing up said that the question was whether the police officers from their place of observation could see what they said they saw. If they did they were entitled to arrest the plaintiff because what they saw would have constituted a breach of the peace. Was there malice when they prosecuted or did they honestly believe that he was committing the act? The jury must not think that because the plaintiff had been acquitted he was entitled to damages. The plaintiff sought to show that the proceedings against him were founded in malice and in a conspiracy between the two constables to obtain his conviction by means of perjured evidence.

The jury found that the plaintiff did not commit an act of gross indecency; that the defendants did not see what they said they saw; that at the police station the defendants did not honestly believe that the plaintiff was guilty of the charge; that they were actuated by malice in initiating the prosecution, and that they arranged with each other to give false evidence. Judgment was entered for the plaintiff for £1,600. [J. D. P.]

COMMENTARY. As a result of this case the Home Secretary was asked whether he would issue instructions to the Metropolitan Police to discontinue the practice of frequenting public lavatories in plain clothes for the purpose of acting as agents provocateurs towards suspected homosexuals. It was pointed out that no Metropolitan Police officers were involved in this case. The Home Secretary rejected the suggestion that it is the practice of the Metropolitan Police to act as agents provocateurs in carrying out duties which, though distasteful, are essential for the preservation of public order and decency (H.C. Debates, Vol. 548, col. 2533; February 16, 1956).

**National Insurance**—*Contributions—conviction for failing to pay—arrears*

SHILVOCK *v.* BOOTH [17] (Q.B. Divisional Court: Lord Goddard

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[17] For the Ministry of Pensions and National Insurance: *Rodger Winn* (instructed by the Solicitor, Ministry of Pensions and National Insurance).

C.J., Hilbery and Stable JJ.: January 27, 1956) ([1956] 1 W.L.R. 135; [1956] 1 All E.R. 382).

The defendant was summoned for failing to pay one contribution which he was liable to pay under the National Insurance Act, 1946, as a self-employed person, contrary to section 2 (6) of the Act. He pleaded guilty and was fined £2. With the summons had been served a notice under reg. 19 of the National Insurance (Contributions) Regulations, 1948, that it was intended to give evidence of the defendant's failure to pay other contributions. The justices considered that they had no power to order payment of arrears, liability for such arrears only arising on proof being given after conviction of failure or neglect to pay.

*Held,* that by virtue of regs. 19 (1) and 19 (3) of the Regulations, the justices had power on conviction to order a defendant to pay the contribution for which he was summoned and also to make an order for payment of arrears. It is a summary and cheap method of recovering contributions without further proceedings.

[J. D. P.]

COMMENTARY. Sums recoverable under regulation 19 are recoverable as penalties.

**Probation**—*Procedure on breach of probation orders*

R. *v.* DEVINE[18] (Court of Criminal Appeal: Lord Goddard C.J., Hilbery and Byrne JJ.: February 13, 1956) ([1956] 1 W.L.R. 236; [1956] 1 All E.R. 548n.).

Byrne J., after dismissing an application by the defendant for leave to appeal against sentence, said that the court desired notice to be taken with regard to a point of procedure which had been observed as a result of considering that case.

Byrne J. said that where a prisoner was brought before a court for breach of a probation order, when he was arraigned before the court the alleged breach should be put to him in the clearest possible terms and he should be asked to say whether he admitted it or not. The terms in which the matter should be put to him were, first of all, to say where he was convicted and what happened to him and then to tell him how the breach was alleged to have taken place, and if it were by a further conviction, then the time of the conviction and the adjudication of the court should also be stated. He should then be asked to say whether he admitted those facts. If that was done, there was no further difficulty. If that was not done, then of course it being a trial, albeit without a jury, the defendant would have to be asked whether he desired to give evidence or call witnesses, and the court would have to pronounce on whether they found the breach of the order had been proved; but it was desirable that the proceedings should begin by the matter being put clearly to the defendant and for him to be asked whether he admitted the allegation with regard to it. [H. P.]

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[18] The applicant did not appear and was not represented. The Crown was not represented.

**Prostitution**—*Injunction to prevent prostitution on certain premises*

THOMPSON-SCHWAB *v.* COSTAKI[19] (Court of Appeal: Lord Evershed M.R., Romer and Parker L.JJ.: February 21, 1956) ([1956] 1 All E.R. 652).

Two residents in a street in Mayfair applied for an injunction, pending the trial of an action, to restrain C. and S. from using or permitting a house in the street to be used for the purposes of prostitution, as their activities constituted a nuisance. Counsel for the defendants contended that the law of nuisance did not cover the activities of common prostitutes.

*Held,* affirming Wynn-Parry J. ([1956] Crim.L.R. 126) that there was a sufficient prima facie case that the activities of the defendants were such as to interfere with the comfort of the plaintiffs so as to constitute a nuisance. [J. D. P.]

**Road Traffic**—*Accident—failure to notify—damage to person's own vehicle*

JONES *v.* JONES[20] (Prestatyn Magistrates' Court: Mrs. S. B. Rees, Chairman: February 29, 1956).

The defendant was charged with failing to stop after an accident contrary to section 22 of the Road Traffic Act, 1930. His car was in collision with an illuminated traffic sign, which was extensively damaged but no other vehicle was damaged by the accident nor was any person or animal injured. The prosecution alleged that the damage caused to the defendant's own vehicle was sufficient to bring the accident within the expression "an accident occurs whereby damage or injury is caused to any person vehicle or animal" and relied on the Scots case of *Tucker* v. *Mackenzie* [1955] Crim.L.R. 712. For the defendant it was contended that the term " vehicle " could not include the defendant's own vehicle and some reliance was placed on *Pagett* v. *Mayo* [1939] 2 K.B. 94. It was pointed out that the construction sought to be placed upon the section by the prosecution would, if accepted, put a considerable burden upon the motorist and also upon the police, and it was easy to envisage many circumstances where trivial accidents of no concern to anyone but the driver involved would have to be reported to the police.

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[19] For the plaintiffs: *I. J. Lindner Q.C., B. B. Stenham* (instructed by Beach & Beach). For the defendants: *Charles Russell Q.C., Maurice Berkeley* (instructed by Reynolds, Gorst & Porter).

[20] For the prosecution: F. Baden Jones, Chief Inspector. For the defendant: J. B. Scowcroft, Solicitor.

*Held,* there was no case to answer and the defendant was discharged.

[Edward Hughes & Co., *Solicitors.*]

COMMENTARY. There is no reported English authority as to whether the term " vehicle " in section 22 includes the defendant's own vehicle. If the section is strictly construed it must, but as Lord Carmont pointed out in his dissenting judgment in *Tucker* v. *Mackenzie,* such an interpretation could lead to absurdity, since everyone would be liable to report the most trifling injury to his vehicle to the police. Nor does it seem to accord with common sense that damage to one's own vehicle should fall within the section, while damage to other people's property does not (*Pagett* v. *Mayo,* above).

### **Road Traffic**—*Driving without due care and attention—failure to give evidence as to driver*

JONES *v.* CARTER [21] (Q.B. Divisional Court: Lord Goddard C.J., Hilbery and Stable JJ.: January 31, 1956).

C. was charged with driving a car without due care and attention contrary to section 12 of the Road Traffic Act, 1930. The magistrates found that there was a collision between two cars, one driven by D. and the other driven by A., due to the driving of a third car, RUM 125. The car, RUM 125, did not stop despite audible warning given by D., and the driver was not seen by any of the witnesses, but the registration number was taken by D.'s wife. No evidence was given, nor was a certificate under section 41 of the Criminal Justice Act, 1948, as to the identity of the driver of RUM 125 put in before the close of the prosecution case, although such a certificate was referred to in the opening of the case. C. did not give evidence. C.'s solicitor contended that there was no case to answer as the driver's identity had not been proved. The magistrates were of the opinion that there was a case to answer, as the cross-examination by C.'s solicitor was at no time directed to the question of the driver's identity. The magistrates rejected the submission of C.'s solicitor, who then reviewed the evidence and asked for a dismissal on the facts. The magistrates convicted C.

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[21] For the appellant: *F. Lawton* (instructed by Ward, Bowie & Co., James A. Lee & Priestley, Bradford). For the respondent: *John Gower* (instructed by Sharpe, Pritchard & Co. for T. Benfield, Town Clerk, York).

*Held,* allowing C.'s appeal, that the court very much disliked giving effect to the point taken by C., because the case was clearly conducted on the basis that C. was the driver, but the court had more than once said that the prosecution had to see that their tackle was in order. Although the court did not understand why the magistrates had not allowed the prosecution to put in the certificate under section 41, nevertheless, as the point had been taken and the court did not wish to encourage sloppy prosecutions, the appeal would be allowed, but without costs.

[Miss C. J. Ellis, *Barrister-at-Law.*]

COMMENTARY. The Divisional Court sets a high standard for proceedings in magistrates' courts: *cf. Gilman* v. *Evans,* p. 256, above, and will not tolerate careless prosecutions. In a case such as the present proof of the driver's identity was a material part of the prosecution's case; it was not proved merely because the defence did not dispute the point until the close of the prosecution's case. In *Middleton* v. *Rowlett* [1954] Crim.L.R. 549, the magistrates refused to allow the prosecution to reopen their case where they had failed to give evidence as to identity, and the Divisional Court refused to interfere with this exercise of the magistrates' discretion.

### **Road Traffic**—*Obstruction—car one of a line of vehicles*

SOLOMON *v.* BURBIDGE [22] (Q.B. Divisional Court: Lord Goddard C.J., Hilbery and Stable JJ.: January 26, 1956) (*The Times,* January 27, 1956).

S. left his motor-car at 11 a.m. on the Victoria Embankment and it remained there unattended until 4.15 p.m. Other cars were standing in the same line. The presence of S.'s car during those hours prevented other vehicles from standing for any period on the place where the car was. On a charge of obstruction it was contended that although one car standing by itself for any length of time might constitute an obstruction, where the car was one of a line of cars, that could not amount to obstruction.

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[22] For the appellant: *A. J. Irvine* (instructed by Amery-Parkes & Co.). For the respondent: *John Averill* (instructed by Comptroller and City Solicitor).

*Held,* that the offence under the Motor Vehicles (Construction and Use) Regulations, 1955, reg. 89, was not one of obstructing the highway, but of causing unnecessary obstruction, and although, if a car stopped for a few minutes, no offence would be committed, in the present case it was clear that an unnecessary obstruction had been caused. [J. D. P.]

COMMENTARY. Regulation 89 provides: " No person in charge of a motor vehicle . . . shall cause or permit the motor vehicle . . . to stand on a road so as to cause any unnecessary obstruction thereof." What is " unnecessary obstruction " is in each case a question of fact.

# *Acts and Orders*

### Agriculture

See FOOT-AND-MOUTH DISEASE (INFECTED AND CONTROLLED AREAS RESTRICTIONS) (AMENDMENT) ORDER, below.

### Animals

FOOT-AND-MOUTH DISEASE (INFECTED AND CONTROLLED AREAS RESTRICTIONS) (AMENDMENT) ORDER, 1956 (S.I. No. 101): operative March 1, 1956. The Orders of 1938 (S.R. & O., Nos. 1434, 1435) are amended. The forms and conditions of licences for the movement of animals are replaced by those contained in the Schedules to the Order and such licences need no longer be countersigned by an inspector of the local authority. Point-to-point meetings are prohibited in infected areas. The racing or training for racing of greyhounds is permitted within infected areas on tracks licensed for the purposes of the Betting and Lotteries Act, 1934.

For penalties for contraventions, see section 79 of the Diseases of Animals Act, 1950.

### British Commonwealth

TRUCIAL STATES ORDER, 1956 (S.I. No. 90): operative February 20, 1956. The Order in Council of 1950 (S.I. No. 1967) and the Trucial States (Fujairah and Kalba) Order, 1952 (S.I. No. 1420), are revoked and replaced with certain amendments. Alteration is made in the procedure for dealing with cases involving both persons subject to the Order and persons not so subject (arts. 67–76). The Political Resident may make regulations providing deportation in circumstances other than those contained in the Order (art. 28 (2)). No appeal lies against an order of deportation, but the Chief Court or the Secretary of State may review, vary or revoke such an order (art. 29). The court in which an appeal has been duly lodged, as well as the court against whose judgment or order the appeal is preferred, may postpone the execution of sentence pending the appeal and either detain the convicted person in prison or release him on bail (art. 37).

## Civil Aviation

AIR NAVIGATION (AMENDMENT) ORDER, 1956 (S.I. No. 82): operative February 1, 1956. The Order of 1954 (S.I. No. 829; see [1954] Crim.L.R. 640) is amended. The particulars to be contained in a journey log book are prescribed. Aircraft not registered in the United Kingdom may be exempted from having a certificate of airworthiness. Requirements concerning the height of nationality and registration marks are altered. Aerobatic flights are forbidden in control areas instead of control zones. Aircraft flown by night over the United Kingdom may not be flown in accordance with the Visual Flight Rules unless they are performing a special V.F.R. flight; aircraft not flown in accordance with the Visual Flight Rules must be flown in accordance with the Instrument Flight Rules. Alteration is made in the requirements governing flight along a line of landmarks or following a track indicated by a directional radio guide.

For penalties for contraventions, see article 67 of the Order of 1954.

## Civil Defence

CIVIL DEFENCE (DESIGNATION OF THE MINISTER OF FUEL AND POWER) (AMENDMENT) ORDER, 1956 (S.I. No. 235): operative February 23, 1956. The Secretary of State is made the designated Minister for the purposes of the Civil Defence Act, 1948, for the provision and supply of electricity over the whole of Scotland.

## Customs and Excise

EXPORT OF GOODS (CONTROL) (AMENDMENT No. 3) ORDER, 1956 (S.I. No. 150): operative February 13, 1956. Licences are required for the export of all iron and steel plates.

## Defence Regulations

DEFENCE REGULATIONS (No. 1) ORDER, 1956 (S.I. No. 178): operative February 16, 1955. The power contained in Regulation 55 (1) of the Defence (General) Regulations, 1939, which relates to the general control of industry, is extended to include a power to make orders for regulating or prohibiting the disposal, acquisition or possession of articles of any description under hiring agreements. The powers conferred by Regulation 55AA, which relates to the keeping of books, making of returns, entry and inspection, may be exercised in relation to any undertaking concerned with the disposal of any articles made subject to such an order.

### Emergency Laws

EXPORTS (RELAXATION OF PRICE CONTROL) (REVOCATION) ORDER, 1956 (S.I. No. 130): operative February 11, 1956. The Order of 1953 (S.I. No. 1705), which exempted from price control the export sales of certain goods, is revoked, but without prejudice to any proceedings for its contravention.

### Food and Drugs

BREAD (AMENDMENT) ORDER, 1956 (S.I. No. 217): operative on February 26, 1956. The maximum retail prices of national bread, national brown bread and national milk bread are increased by ¾d. for the 14 oz. loaf and at the rate of ½d. per 14 oz. for all other weights.

### Hire-Purchase

CONTROL OF HIRING ORDER, 1956 (S.I. No. 179); HIRE-PURCHASE AND CREDIT SALE AGREEMENTS (CONTROL) ORDER, 1956 (S.I. No. 180): both operative February 18, 1956. The disposal and possession of goods under hiring agreements is controlled. Goods specified in Schedule 1 to the Order may not be disposed of under an agreement to let them on hire entered into after February 17, 1956, unless (1) the agreement is in writing; (2) where the agreement is for a definite period of nine months or less, the whole of the rentals and charges for services payable under that or any related agreement are paid before the signing of the agreement; (3) in any other case the whole of the rentals and charges payable during the first nine months are paid before the signing of the agreement, and the remaining rentals and charges are payable in accordance with the terms of Schedule 2 to the Order. Where goods not subject to the Order are comprised in the same agreement as goods so subject, these requirements must be fulfilled in relation to all the goods. Agreements subject to the Order may not be varied in respect to the amount or time of payments, or so as to include goods to which the Order applies not comprised in them before. Where goods have been hired for a definite period of nine months or less, any further hiring of those goods to the same person is prohibited, except that where goods have been hired for less than one month, the hiring may be extended so long as the total period of hire does not exceed one month. Other agreements may not be renewed or extended if after such renewal or extension any rental payable is greater than the smallest rental payable before such extension or renewal. The Order does not apply to the disposal or possession of goods held under an agreement where the hirer is not to be in possession for more than twelve days in any twenty-eight.

The Hire-Purchase and Credit Sale Agreements (Control) Order, 1955 (S.I. No. 297; see [1955] Crim.L.R. 258), as amended, is revoked and replaced. The principal changes are: (1) additional goods are affected and control imposed on their disposal and possession under agreements entered into after February 17, 1956; (2) the minimum deposit is increased in the case of all goods previously controlled; (3) where aircraft, including gliders, ships and boats, and certain fixed and movable plant, machinery, appliances, equipment and apparatus of all types, are subject to an agreement which provides for payments on account to be made by the purchaser during the manufacture or installation, the deposit may be paid before the delivery of the goods instead of before the signing of the agreement and the balance paid by equal instalments from the date of delivery; (4) the exclusion of short term credit sale agreements is modified; (5) in proceedings for an alleged contravention of the Order it is a defence to prove that the goods subject to the agreement were to be, or had been, exported at the time of the alleged contravention.

For penalties for contraventions, see regulation 92 of the Defence (General) Regulations, 1939.

See also the DEFENCE REGULATIONS (NO. 1) ORDER, p. 278, above.

### International Law

DIPLOMATIC IMMUNITIES RESTRICTION ORDER, 1956 (S.I. No. 84): operative March 31, 1956. Diplomatic immunity is withdrawn from the members of the staffs of certain foreign envoys, from the families of such persons and from servants of certain envoys.

### London

The following Orders have been made detailing prescribed routes: S.I. 1956, Nos. 67 (Bermondsey, Camberwell and Southwark); 140 (Leyton); 141 (Watford); 166 (Slough); 167 (Welwyn Garden City).

The following Order has been made prohibiting waiting: S.I. 1956, No. 188 (Slough).

The following Orders have been made amending Regulations as to unilateral waiting: S.I. 1956, Nos. 193, 194.

The following Order has been made altering the streets in which the sale of goods from vehicles, waiting, loading and unloading, are restricted: S.I. 1956, No. 195.

## Merchant Shipping

MERCHANT SHIPPING (SAFETY CONVENTION COUNTRIES) (VARIOUS) (No. 1) ORDER, 1956 (S.I. No. 234): operative March 2, 1956. The International Convention for the Safety of Life at Sea, 1948, has been extended to the Comoro Islands, French Equatorial Africa, French Somaliland, French West Africa, Madagascar and its dependencies, Morocco (French Zone), New Caledonia and its dependencies, French possessions in Oceania, Saint Pierre and Miquelon, the Trust territories of Togoland and Cameroons under French administration and Tunisia.

HUMBER AND TRENT RULES (REVOCATION) ORDER, 1956 (S.I. No. 86): operative March 1, 1956. The Humber Rules, 1910 (S.R. & O., No. 832), as amended, and the Trent Rules, 1910 (S.R. & O., No. 833), which contained provisions concerning the lights and signals of vessels and the avoidance of collisions in the Rivers Humber and Trent, are revoked. These matters will now be dealt with in bylaws made under the Humber Conservancy Acts, 1852 to 1951.

## Pest Control

IMPORTATION OF POTATOES ORDER, 1955 (S.I. No. 228): operative February 24, 1956. The Importation of Plants Order, 1955 (S.I. 1955, No. 81; see [1955] Crim.L.R. 196), is varied, and potatoes grown in 1955 in Belgium, France or the Netherlands may be landed in England and Wales during the period beginning on February 24, 1956, and ending on May 31, 1956. Such potatoes must, however, have been grown in a district where there is an intensive system of control of Colorado beetle and they must have been riddled in an approved packing station and immediately have been securely packed in new bags with the label of the packing station attached to each bag. Except so far as they are inconsistent with this Order the relevant provisions of the Order of 1955 apply to the landing of these potatoes.

For penalties for contraventions, see article 14 of the Order of 1955.

### Police

Police Regulations, 1956 (S.I. No. 154): operative February 13, 1956. Refreshment, subsistence and lodging allowances are increased and are now as follows:

| | Superintendents | | Inspectors | | Sergeants and Constables | |
|---|---|---|---|---|---|---|
| | s. | d. | s. | d. | s. | d. |
| Refreshment Allowance— | | | | | | |
| (i) for one meal ... ... | 5 | 0 | 4 | 6 | 3 | 9 |
| (ii) for two meals ... ... | 7 | 0 | 6 | 6 | 5 | 9 |
| Subsistence Allowance: | | | | | | |
| Period of retention or engagement— | | | | | | |
| (i) over 5 hours and not exceeding 8 hours ... | 7 | 0 | 6 | 6 | 5 | 9 |
| (ii) over 8 hours and not exceeding 12 hours ... | 10 | 6 | 9 | 6 | 8 | 0 |
| (iii) over 12 hours and not exceeding 24 hours ... | 17 | 0 | 14 | 6 | 13 | 0 |
| (iv) over 24 hours—at the rate under (iii) above for each complete period of 24 hours' retention or engagement, together with whichever is the appropriate amount under the preceding provisions of this scale for any excess over the aggregate of such complete periods. | | | | | | |
| Lodging Allowance—for each night | 27 | 6 | 21 | 0 | 18 | 0 |

### Scotland

*Police*

Police (Scotland) Amendment Regulations, 1956 (S.I. No. 174): operative February 13, 1956. Refreshment, subsistence and lodging allowances are increased as in the English Regulations; see above.

## Practical Problems

*All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 3 Chancery Lane, London, W.C.2." The questions of subscribers only are answerable in the Review. All questions should be submitted in duplicate. The Publishers cannot accept any responsibility for the correctness of the replies.*

### 1. *Larceny of a hired car*

In our division a case occurred recently which has caused differences of opinion as to the law applicable. A medical student hired a car for a week in order to spend his honeymoon in touring. One of his fellows who knew of the hire, took the car, presumably as a joke, while the bridegroom was still at the reception and kept it until the expiration of the hire period when he returned it to the car hire firm. No action was taken against the culprit, but the question being argued is—could he have been charged with larceny, or was "taking and driving away" the extent of his offence? [M.]

### Answer

The answer to this question turns on the precise meaning of the words in section 1 of the Larceny Act, 1916, "with intent . . . permanently to deprive the owner thereof." At first sight, it would seem that the student had not this intent if, as seems likely, at the time of the taking he meant to return the car to the hire firm. But it must be remembered that for the purposes of the law of larceny the "owner" is not the hire firm, but the bailee of the car, *i.e.*, the bridegroom. Since this owner only had a limited interest in the car, *viz.*, a bailment for a week, can it not be said that he is permanently deprived of his property if the car is kept from him for the whole of the remainder of the week? We know of no authority on the subject, but we think a charge of larceny would probably succeed, since the defendant knew of the limited nature of the bailee's interest. The cases wherein it is said that one cannot steal a ride on a horse or the temporary use of a thing seem beside the point since there the prosecutor was the general owner. [D. W. E.]

### 2. *Firearms licence, effect of sentence of imprisonment*

It has been contended recently by a colleague at my station that a man released from prison having served three months' imprisonment for wife maintenance arrears would be prohibited by section 21 (1) of the Firearms Act, 1937, from possessing a firearm or ammunition. I would be grateful to you for your opinion on this point. [N. W. N.]

### Answer

The section mentioned lays it down that a person who, among other penalties, has been sentenced to imprisonment for a term of three months or upwards for any crime shall not, at any time during a period of five years from the date of his release, have a firearm or ammunition in his possession. So the point is, does failure to obey a court order to pay wife maintenance amount to a crime, within the meaning of the Firearms Act? In the absence of any guidance in the Act itself, we should think that such a failure is certainly not a crime. Other Acts—for instance, the Prevention of Crimes Act, 1871, or the Conspiracy and Protection of Property Act, 1875—give definitions of the word "crime," but they all show that, for their purposes at any rate, a crime is something that is punishable, either on indictment or summarily, by a sentence of imprisonment or otherwise; that is to say, a matter which is dealt with by information, conviction and sentence. Failure to pay wife maintenance, on the other hand, is a matter which belongs rather to administrative law; that is to say, it is dealt with by complaint and order. It is this administrative flavour of the proceedings under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, and the Magistrates' Courts Rules, 1952, which suggests strongly that imprisonment for failure to make payments on a maintenance order cannot be regarded as a crime for the purposes of the Firearms Act, 1937, and that imprisonment for the failure will not carry disqualification. Even if the original order had been made in the High Court, under the Matrimonial Causes Act, 1950, which would have made disobedience contempt of court, this would be civil contempt, not criminal contempt, and so still not a crime. Incidentally, it may be of interest to note that we believe it to be a practice in H.M. Prisons to get a prisoner on release to sign a declaration that he will not apply for a firearms certificate for five years; but that this declaration is not asked for from a prisoner who has been serving a term of imprisonment for maintenance arrears. [N. W.]

### 3. *Disposal of recognizance on grant of bail*

A judge in chambers has granted bail to a prisoner who had been refused it by magistrates. The judge's order states that the recognizance of the surety may be entered into before any justice of the county, but no directions are given as to the disposal of this recognizance when it has been formally drawn up. No provision of the Magistrates' Courts Act, 1952, seems to cover the situation; should the recognizance be sent to the appropriate Registrar of the High Court? [M. S. C.]

#### ANSWER

Rule 13 (7) of the Rules of the Supreme Court (Criminal Proceedings), 1938 (as amended by S.I. No. 721 of 1949) requires that such a recognizance shall be sent to the clerk of the court of trial, if the defendant has been committed for trial, and in any other case, to the clerk of the court which committed the defendant. A copy of the recognizance is to be sent to the governor of the prison in which the defendant is detained. [A. E. J.]

### 4. *Gambling in a disused warehouse*

Certain gaming activities in this industrial area are causing concern. There is a gambling school which has taken to operating behind locked doors in an office of a disused warehouse that is awaiting demolition and rebuilding, the organisers of the school having apparently provided themselves by some means with a key to the premises. I think the police should arm themselves with a warrant under section 3 of the Gaming Act of 1845, as I am satisfied that the gaming in the office constitutes an offence against section 4 of the Gaming Houses Act of 1854. I have been advised, however, that because the gamblers are trespassers, therefore they cannot be touched. What is your opinion? [C. C. B.]

#### ANSWER

If the organisers of this gambling school are genuine trespassers, then we agree with your advisers that you cannot touch them under the Acts quoted. Section 4 makes it an offence if certain people open, keep or use a house, room or place for the purpose of gaming. The people who can commit the offence are the owners, the occupiers or persons having the use of the house, room or place. Now, although it may be said that trespassers do have, in one sense, the " use " of the office, it is at best a *de facto* use, and an unlawful one at that. We are of the opinion that the sort of use contemplated by the statute must at least be a *de jure* use; that is to say, unless the gamblers have got some sort of lawful right to be there, their gaming activities do not fall within the section. We think, therefore, that your best action would be to tell the owners of the property, or their agents, all about what is going on, and to warn them that, if they continue to allow the gamblers house-room, they (and the gamblers) may be liable to criminal prosecution; because to allow the gamblers to continue to frequent the place would give the latter the sort of *de jure* use we think the statute demands. No doubt, however, the warning would be unnecessary; the owners would merely secure their premises better and so exclude the gamblers, thus ending your problem for you. [N. W.]

# *Letters to the Editor*

## The Law and Homosexuality

Sir,

Mr. Eddy, in his article on the Law and Homosexuality [1956] Crim. L.R. 22, does not adequately explain why homosexual conduct between consenting adults in private should be the concern of the criminal law except upon the grounds of its historical origin. That most of us who are " normal " regard homosexual conduct as undesirable or unpleasant is no more reason to apply criminal sanctions to it than to extramarital heterosexual behaviour or forms of dishonesty which the criminal law does not at present encompass. Surely we must look for the evil before we damn such conduct on purely aesthetic grounds? The defeated recommendation would not have altered the position where the corruption of young people, or offensive public behaviour, is concerned; matters which are rightly the concern of the criminal law as they affect innocent parties.

Views on the efficacy of the treatment of homosexuals are by no means uniform amongst psychiatrists. The truth is that those homosexuals who are sufficiently disturbed about their condition to seek treatment can obtain it privately or at a clinic. Those whose behaviour is anti-social and come before a court may be persuaded to undergo treatment, if necessary in custodial conditions. Those who, regardless of coercion, reject treatment, will do so whatever the law says, and as Mr. Eddy points out, cure is not likely in those cases.

Yours faithfully,
REX COWAN,
Solicitor.

*University of Southern California, Los Angeles.*

# *Books and Periodicals*

**Reviews:**

*Road Transport Law.* Tenth edition. By L. D. Kitchin, A.M.INST.T., revised by E. K. Wenlock. London: Iliffe & Sons, Ltd. 1955. 126 and (index) 9 pp. (10s. 6d. net.)

"*Special Reasons.*" Third edition. By W. E. Blake Carn, Solicitor, Clerk to the Justices. London: Shaw & Sons, Ltd. 1955. 72 pp. (7s. net.)

*Road Transport Law* is a reference book dealing with all aspects of the law relating to the construction, equipment and operation of motor-vehicles. It is a little salutary to find that only 9 out of the book's

126 pages deal with the common law affecting vehicles and drivers, the rest of the book being devoted to summaries of the various Acts and Regulations. Although the law is stated in a summarised form, a reference is given after each statement to the Act or Regulation concerned, so that reference may be made to the actual legislation. The matter is presented in alphabetical order and there is an admirable index, but one rather surprising omission is a table of cases. The latter is often a useful means of finding obscure law.

In this, the tenth edition of the book, the law is stated as it stood on August 15, 1955, and the book incorporates the new Construction and Use Regulations and other changes. There can be little doubt that this handy reference book will continue to render invaluable service to all those connected with the operation or manufacture of motor-vehicles.

"*Special Reasons*" is also a reference book, though of a different kind. It deals with cases decided under sections 11, 13, 15 and 35 of the Road Traffic Act, 1930, where the court is bound to impose a disqualification from driving on the offender unless there are "special reasons" arising out of the offence which enable it to order otherwise. It seems extraordinary that the legislature has given no guidance of any kind as to what might constitute a "special reason," and it has been left for the courts themselves to lay down principles. This book summarises twenty-three of the more important cases with relevant extracts from the judgments. It is by no means exhaustive, but since it is intended as an easy means of pocket reference, largely for advocates and magistrates, that detracts not at all from its value. In short, this book admirably fulfils its purpose, namely, to summarise and set out in a handy form the leading decisions on "special reasons."

HENRY PALMER.

**Books Received:**

*Alphonse Bertillon.* Father of scientific detection. By Henry T. F. Rhodes. London: George G. Harrap & Co. 1956. 219 and (appendices, references and index) 19 pp. (15s. net.)

*Portrait of a Bad Man.* The Life and Death of Ronald Chesney. By Tom Tullett. London: Evans Brothers, Ltd. 1956. 196 pp. (12s. 6d. net.)

*An Introduction to Evidence.* Second edition. By G. D. Nokes, LL.D., Barrister-at-Law, Professor of Law in the University of London. London: Sweet & Maxwell, Ltd. 1956. xxxvi and 468 and 12 pp. (37s. 6d. net.)

*A Life for a Life?* The problem of capital punishment. By Sir Ernest Gowers. London: Chatto & Windus. 1956. 138 and (appendix) 6 pp. (7s. 6d. net.)

*Obscenity and the Law.* By Norman St. John-Stevas. London: Secker & Warburg. 1956. xii and 203 and (appendices and index) 83 pp. (25s. net.)

*Capital Punishment as a Deterrent: and the Alternative.* By Gerald Gardiner Q.C. London: Victor Gollancz, Ltd. 1956. 92 and (notes) 3 pp. (6s. net.)

**Reader's Digest:**

*Corrective Training*: Mr. J. Ll. J. Edwards criticises *R.* v. *McCarthy* [1955] Crim.L.R. 576 and the assessment of the length of corrective training by the length of imprisonment which would be appropriate: 72 *Law Quarterly Review* 117.

*Evidence—Hearsay*: Mr. Rupert Cross reformulates the rule against hearsay and draws attention to a number of common law exceptions to the rule not mentioned in books on evidence: 72 *Law Quarterly Review* 91.

*Identification and handwriting*: The classification of specimens of handwriting in a criminal identification department is considered in the *International Criminal Police Review*, January, 1956, at p. 17.

*Jurisdiction of magistrates' courts*: The jurisdiction of a magistrates' court to deal with offences committed outside the county or borough is considered in the *Journal of Criminal Law*, January, 1956, at p. 88.

*Witnesses*: The new Witnesses' Allowances Regulations and the basic principles on which the costs of police prosecutions are chargeable to the police account or local funds are reviewed in the *Police Review*, February 3, 1955, p. 76.

*Roads*: What is a road? Mr. J. Hampton considers some of the cases raising this question: 120 *Justice of the Peace Journal* 114.

*Police*: Some ways of increasing police efficiency are examined in the *Police Review*, February 24, 1956, at p. 129.

*The Journal of Criminal Law, Criminology and Police Science*: The November–December, 1955, issue of this journal contains material concerning responsibility in the criminal law collected for the American Law Institute's Model Penal Code; see p. 450. Other articles of interest are The Juvenile Offender in Norway, p. 500; Post-mortem temperature and the time of death, p. 562; The selection and phrasing of lie-detector test control questions, p. 578; and The Japanese police, p. 583.

# THE
# CRIMINAL LAW
# REVIEW

*Editors*
JOHN BURKE and PETER ALLSOP, M.A.
*Barristers-at-Law*

## *Editorial*

**Burden of proof**

On January 14 Mrs. Bolton, a prostitute, was found dead in her flat, having been killed by eight wounds in the head which had been inflicted by an axe or similar weapon. A man called Atter was charged with her murder. He admitted that he was with the woman until 2.15 a.m., but said he then left her flat because she told him she had another visitor coming at 3 a.m. The principal scientific officer at the Metropolitan Police Laboratory carried out a benzidine test on various articles of clothing belonging to Atter. Apart from a handkerchief there were no bloodstains, but certain garments gave a positive reaction to the presence of blood; the witness was not prepared to state that it was human blood. A copy of the magazine *True Detective* was found in Atter's room, telling the story of a motiveless killing which the Crown alleged was remarkably similar to the murder of Mrs. Bolton. Counsel for the prosecution said that the case for the Crown was the accumulation of small items of circumstantial evidence, such as these. For the defendant, Mr. A. P. Marshall, Q.C., submitted that there was nothing more than suspicion and that there was not a single piece of evidence which had the quality of implicating the accused. Devlin J. accepted that submission and directed the jury to return a verdict of Not Guilty. He explained that an accused person had every right to demand that the prosecution's case against him should be proved before he went into the witness box, and continued:

"Where one has a case where the evidence is purely circumstantial then I must satisfy myself, in my judgment, that there is some piece of evidence that is more than mere suspicion, that there is some piece of evidence which would justify me in saying that points to the accused. You cannot put a multitude of suspicions together and make proof out of it. It may be that if you were asked now whether on the evidence you would convict the accused in a case of this sort you would not think it safe to do so, but it is not for me to put that responsibility upon you until after I have discharged mine, and my responsibility is the one that I have stated. . . . Having formed the view that I have, I tell you now that as a matter of law there is no evidence on which you can convict, even if you wished to do so."

The jury returned a formal verdict of Not Guilty and the defendant was discharged.[1]

### Common law cheats—modern style

In describing, at [1954] Crim.L.R. 354, the type of criminal offence which has come to be known, in Revenue prosecutions, as "the common law misdemeanour," our contributor "Clericus" remarked that the express approval of the Court of Criminal Appeal had never been given to this form of charge. *R.* v. *Hudson,* p. 333, below, fills the gap. Rejecting the argument that the offences alleged in that case were unknown to the law, Lord Goddard C.J. traced the matter back to a statement in Hawkins' *Pleas of the Crown* that all frauds affecting the Crown and the public at large are indictable as cheats at common law. If one subject cheats another by means of lies that is not (apart from statute) indictable; but it is otherwise if a false representation or device is used to defraud the Sovereign, because that is a fraud on the public. The appellant was held to have been rightly convicted of fraudulently causing to be delivered to an Inspector of Taxes business accounts which understated his profits, and of fraudulently delivering a false certificate of disclosure, a brand of document well known in Revenue back-duty practice. So to hold was not to make a new offence: the court was merely reaffirming what the common law had always been on the matter.

Recently (see [1956] Crim.L.R. 2), the Lord Chief Justice fined two men found guilty of tax frauds instead of sending them to prison because of the considerable delay which there had been in prosecuting them. Diplock J. followed the same course in a case at the Bristol Assizes on March 1, when two men, Reynolds and

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[1] See *The Times*, March 21, 22, 1956.

Milne, were convicted of defrauding the Inland Revenue. Sentencing Reynolds, Diplock J. said that he had decided not to send the defendant to prison because of the delay of five years between the time when Reynolds made a complete disclosure and the bringing of the prosecution. His Lordship said: "Although I have heard reasons why it has taken five years since then for this prosecution to be brought, I am not satisfied that that delay, during which period you have suffered very seriously, was justified, and I take into consideration the suffering that a man of your reputation must have endured during the period of five years, which I regard, from what I have heard in this case, as unnecessary. But you nearly got away with £80,000 tax and in fining you I must fine you a serious sum you will feel." Reynolds was fined £10,000, with the alternative of eighteen months' imprisonment in default of payment. In the case of Milne the delay in prosecution had been one of two years. His offence was not as serious and he was fined £500, with the alternative of six months' imprisonment in default of payment. The prosecution were refused costs.[2]

At the Central Criminal Court on March 14 Devlin J. sentenced one Albert Wuertz-Field to six months' imprisonment and fined him £5,000, with the alternative of twelve months' imprisonment in default of payment, for defrauding the Inland Revenue of £18,786 between 1931 and 1950. The judge said that were it not for the defendant's age, sixty-nine, and his infirmities, he would have been sent to prison "for a substantial time." [3]

### Sir Travers Humphreys

The Rt. Hon. Sir Travers Humphreys, who retired from his position as a judge of the Queen's Bench Division five years ago, died on February 20, aged eighty-eight. During his long life Sir Travers was associated with many famous criminal trials, first as counsel and later, after his promotion to the Bench in 1928, as judge. He was a master of the English criminal law and won much respect by his administration of criminal justice. As a tribute to this great lawyer, we are publishing at p. 297, a talk which he gave on October 15, 1948, to members of the Central Criminal Court Bar Mess.

### Driving offences

A man went to drain the radiator of his car and was later found asleep over the wheel. He had not got the ignition key and had not the slightest intention of driving. Nevertheless he was found guilty of being drunk in charge of a vehicle, fined and disqualified. A docker went to sleep in a stranger's car which he found parked in a street and was found guilty of the same offence, fined and disqualified. These cases point to the need for the change in the law which may be effected by the Road Traffic Bill now before Parliament. This provides that it may be an offence to be in charge of a motor vehicle on a road or in any other public place even though the person charged was not driving or attempting to do so, but it is a defence that " the circumstances were such that there was no likelihood of his driving the vehicle so long as he remained unfit to drive."

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[2] See *The Times*, March 2, 1956.

[3] See *The Times*, March 15, 1956.

Some people would regard it as a more serious offence to drive with an arm around a passenger's waist. But the law does not require a driver to use both hands while driving so long as the car is under proper control. On these grounds the Dorking magistrates dismissed a case where the defendant was charged with having driven without proper control of the car, it being alleged that he had only one hand on the wheel and his other arm around his passenger. In similar circumstances, however, the Jarrow magistrates found a defendant guilty of dangerous driving. It was alleged that he had been driving at 50 m.p.h., had skidded, hit the kerb and passed a traffic bollard on the wrong side.

### Dangerous driving

That juries are reluctant to convict of manslaughter where a defendant is charged with killing a man while driving, except where it is proved that the defendant was drunk, was illustrated in a case heard in January at Bedfordshire Assizes. The defendant, when driving along Watling Street on a stretch of road which was straight for at least 1½ miles drove onto the wrong side of the road, mounted the verge, bounced off, collided with a motor-bicycle combination coming in the opposite direction and killed both the driver and his passenger. The defendant admitted that his speed was 70 m.p.h. and that he never saw the motor-bicycle combination before he hit it. He suggested that he was dazzled by the sun, but admitted that the sun had been in the same position with reference to his car for the previous 1¼ miles. He denied that he had dozed off while driving. The defendant was convicted of dangerous driving, fined £100 and disqualified from driving for five years.

### Offences on private roads

After considering the decision in *Buchanan v. Motor Insurers' Bureau* [1955] Crim.L.R. 321 in which McNair J. held that roads in the London docks were not roads within the meaning of the Road Traffic Act, 1930, the Southampton magistrates on June 1, 1955, dismissed a summons for driving a motor-cycle at a speed exceeding fifteen miles an hour on a road in Southampton docks. As a result the Home Secretary has decided to recommend the grant of free pardons applied for by forty-nine persons convicted of traffic offences at those docks.

### Crime in other countries

Sir Basil Henriques, the former chairman of East London Juvenile Court, has recently visited the United States. He considers that juvenile crime in Britain is negligible compared with that in the United States, and said on his return that he heard in every court in America in which he sat cases more serious than any he heard in his thirty-three years on the bench in London.

In Poland a most effective method of dealing with drunkards has been introduced—they are sentenced to street cleaning in full view of their friends. Offenders have offered to pay fines or go to labour camps rather than suffer this particular form of punishment, which is reminiscent of the pillory and the stocks. The number of drunken brawls has rapidly decreased.

The crime rate in France has dropped according to figures published by the police. They carried out a total of 632,695 investigations in 1955, compared with 642,316 in 1954.

### Police Report

The Report of H.M. Inspectors of Constabulary for the year ended September 30, 1955 (H.C. 203) [1s. 3d.] shows a grave deficiency in police manpower. The strength of the forces at the end of the inspection year was 5,655 short of the authorised establishments. The loss by resignation during the year of over 2,000 men before they qualified for pension was the heaviest drain of its kind for some years. The reasons for such resignations were investigated and there proved to be four main ones, namely, to obtain more remunerative employment; inability to settle down to the life and duties (including discipline, varying shift or split duties); domestic difficulties, particularly where wives are unwilling to face the varying hours which police duty involves for their husbands on Bank holidays, in the evenings, at weekends, and in all weathers, and emigration, including appointment to a Commonwealth or Colonial police force.

The improvement in conditions of service intended by the reduction in the hours of duty from forty-eight to forty-four has not been attained because of the deficiency in police strength. In many forces a forty-eight hour week is still worked and compensation for the loss of the extra rest day is made by payment at the rate of time-and-a-half. The Report urges, however, that this should be a temporary expedient and that the extra rest day should be granted as soon as practicable.

The Report considers, among other things, police discipline, training, communications and housing and traffic and road safety. It speaks of the great improvement in the organisation, training and efficiency of the police and pays tribute to the personal efficiency and zeal on the part of the general body of police in carrying out their duties.

### Withdrawal of writ of attachment

The Divisional Court (March 16, 1956) gave leave to the Commissioners of Customs and Excise to withdraw a motion for a writ of attachment granted by the court on December 20, 1955 ([1956] Crim.L.R. 130) for contempt of court in failing to obey a subpoena issued by the Crown Office. It appeared that the person against whom the writ was to issue was now serving a term of three years' imprisonment and, in the circumstances, it was considered unreasonable to bring him before the court on the writ.

### Compensation for stolen property

An interesting point arose at Clerkenwell Magistrates' Court when Mr. Frank Powell, the Metropolitan Magistrate, was asked by a defendant convicted of larceny to take into consideration a similar offence in passing sentence. The second offence involved property which was irrecoverable and it was desirable that the person from whom it had been stolen should be compensated. Under section 34 of the Magistrates' Courts Act, 1952, power is given to magistrates to award compensation where the court " convicts a person of felony " and the magistrate considered that to take an outstanding offence into consideration for the purposes of sentence was not to convict within the meaning of the section. On the magistrates' instructions the defendant was formally charged with the second offence to which he pleaded guilty. He was given a conditional discharge and ordered to pay £23 to the person whose property had been stolen. Mr. Powell said that outstanding charges involving property should be charged as substantive offences whenever possible.[4]

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[4] 20 *Journal of Criminal Law* 12.

### A fruit loaf

In a recent case heard at Marylebone Magistrates' Court [5] the question was raised as to what constituted a fruit loaf. A limited company, who were summoned for selling underweight loaves contrary to article 3 (1) of the Bread Order, 1953, alleged that the loaves in question were fruit loaves and therefore exempt from the provisions of article 3, as the definition of bread in the Order specifically excludes fruit loaves. The bread, of a type commonly known as a Continental caraway fruit bread, contained caraway seeds. A botanist from the British Museum said in evidence that it would be more correct to describe caraway seed as a fruit and certainly not as a seed. Counsel for the defence argued that in drafting the Order a distinction had been drawn between plain bread and bread to which other things had been added; one could not say that fruit loaves were confined to those containing fruit like currants or sultanas. Although Mr. Geoffrey Raphael felt that the latter interpretation had been intended, he dismissed the summons, because he had some doubt as to what the Order really provides.

### Detention centre

Campsfield House detention centre has been open since August, 1952. In the light of the experience gained there the Home Office has issued a circular, which we publish in full at p. 320, containing certain observations which may be of value to justices selecting cases for treatment at a detention centre.

### Prison officers

The Prison Officers' Association has accepted pay increases recently offered ranging from 18s. 6d. a week for lower grades to 31s. for higher grades. The increases are to be back dated to November 1.

### Parliament

*Debates*

Vice in London was a subject raised in a debate on the adjournment, and in answering the Joint Under-Secretary of State for the Home Department made it clear that the Government do not accept the suggestion that prostitution in the West End is a racket run with the knowledge, approval and concurrence of the police. He outlined the measures taken by the police to suppress vice (H.C. Debates, Vol. 549, col. 1896 *et seq.*; March 5, 1956). On

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[5] See 20 *Journal of Criminal Law* 21.

March 9, the House of Commons at long last debated the Report of the Royal Commission on Betting, Lotteries and Gaming on a private member's motion. It is the Government's intention to deal with this matter as soon as opportunity presents itself by introducing a Bill to implement the main lines of the Royal Commission's recommendations (Vol. 549, cols. 2503 *et seq.*). During the debate on the Consolidated Fund Bill, the negotiations which resulted in an increase in pay given to the police following the arbitration tribunal award last December were criticised and the question raised whether in future such awards could be given retrospective effect (Vol. 550, cols. 1317 *et seq.*, 1407 *et seq.*; March 21, 1956).

### *Fines*

The Home Secretary rejected a suggestion that legislation should be introduced to treble the maximum fines that can be imposed by the courts because money has depreciated by so much of its prewar value. He has no information to suggest that the courts generally regard such fines as inadequate and it would be necessary to consider each offence separately on its merits (Vol. 549, col. 1348; March 1, 1956).

### *Prisons*

On February 7, 1956, the latest date on which such information is available, of 13,463 male prisoners located in ordinary cells, 10,982 were alone in a cell and 2,481 were three to a cell. Another 3,527 male prisoners were located in other types of accommodation (Vol. 549, col. *224*; March 8, 1956).

### *Slaughter of animals*

The Minister of Agriculture and Fisheries will not vary the Slaughter of Animals (Prevention of Cruelty) Regulations, 1954, so as to vary the powers of enforcement where local authorities are owners of slaughter-houses; he is satisfied that the duty of ensuring that the Regulations are observed should remain with such authorities (Vol. 550, col. *136*; March 22, 1956).

*Subscribers and others are invited to submit for publication articles and letters on matters of interest within the scope of this Review. They should be sent to the* EDITOR, *Criminal Law Review*, 3 CHANCERY LANE, LONDON, W.C.2. *Every effort will be made to return drafts or unsuitable copy, but no guarantee can be given in this respect.*

*Books for review should be sent to the Publishers at the above address.*

# *The Bar as a Profession*

*with some*

## HINTS TO BEGINNERS[1]

By Travers Humphreys

Perhaps I should begin by explaining why I am here. It was not my own idea to give this talk, but it was suggested to me by others that an old practitioner might be able to offer a little help in the form of hints to beginners to those of the younger generation who have not had the advantage of reading in chambers and so learning something of the traditions of the Bar. My remarks are addressed to those lately joined members of my old Mess whose ambition it is to become successful practising barristers. To barristers who look upon the Bar as a means of furthering their political ambitions I have nothing to say. Nor can I hope to teach much to the past or present pupils of a practising barrister. Their money will indeed have been wasted if they are not already familiar with the elementary matters upon which I am about to speak to you.

Pupillage is undeniably the best introduction to the profession. The pupil learns in what I have always regarded as the most delightful of all schools; where the scholars observe and learn from the performances in public of their teachers, what to do and how to do it, and at times what not to do and how to avoid doing it.

To those, however, who have not had the advantage of reading in chambers I would say that while there must always be an element of gambling in entering upon a profession in which there are no partnerships, no stock in trade and no goodwill attaching to a practice when acquired, there are still some prizes, and history shows that to a man of average ability prepared to work really hard the Bar offers a reasonable prospect of making a livelihood. Reliable "devils" are always in demand, while solicitors and their managing clerks are naturally on the look out for a new man who will take a small fee and will put his back into a case.

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[1] This is the text, hitherto unpublished, of a talk given to members of the Central Criminal Court Bar Mess on October 15, 1948, by the Rt. Hon. Sir Travers Humphreys. It was found among the late judge's papers by his son, Mr. Christmas Humphreys, who sent it to us for publication as a memorial to his father.

The Bar is, and always has been, the most generous and least jealous of professions. Upon his call to the Bar the young barrister is usually informed by the Treasurer of his Inn that he has a right to ask for the advice and help of any senior member of the Bar upon any matter which may arise in the exercise of his profession, particularly any question touching upon the etiquette of the Bar. I have not the slightest doubt that the distinguished barrister who at present holds the office of Attorney-General [2] would agree with me that the tradition holds good today and involves the right of access to himself as Head of the Bar of England. In saying that, I have not overlooked the creation in modern times of that somewhat amorphous body, the Bar Council.

I repeat that the Bar was and is free from jealousy. I was sorry upon a recent occasion to hear the contrary suggested by a woman barrister. The success of some members of her sex is perhaps the best answer to her, but I would add that I think the mistake arose from the notion that a woman barrister is entitled to briefs because she is a woman, whereas the truth is, of course, that women form a very small percentage of the members of the Bar and must take their chance alongside their far more numerous male competitors.

If there be, and I am informed there are, some circuits the women members of which are not eligible for the Mess, that is a domestic matter into which it is no concern of mine to enter (though personally I think it a mistake), but I can assure the ladies that their exclusion is to the advantage of their health, their pockets, and their blushes; that is if there still are women who blush.

Now, the Tradition of the Bar is a *Tradition of Service*—of service to the client in the first place and through the client of service to the cause of Justice—since Justice requires that both sides to a dispute should be freely and fearlessly presented to the tribunals of fact and law respectively. That can best be done, indeed in my opinion can only be done, by a competent Bar. That must be my excuse for asking you to listen for a short while to the suggestions and perhaps the grumbles of one of the Have Beens.

The duties and responsibilities of a barrister begin for the most part when a brief has been delivered and accepted and, since we are in a building dedicated to the Criminal Law, let us assume that the brief is one to defend an accused person. From that moment the barrister is charged with precisely the same duty as was laid upon Sir Charles Russell in defending Mrs. Maybrick,[3] or upon Sir Edward Clarke in his brilliant and successful fight for the life of Adelaide Bartlett.[4] The responsibility of presenting in the most attractive manner the proper defence of his client is his and his alone; he is the sole person recognised by the court as having the right to advise and speak for his client. Even the accused himself will not be heard by the court so long as his counsel represents him. Counsel cannot share that responsibility with anyone, though he may be helped by a solicitor and he may, and should, seek the advice of his fellow barristers.

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[2] Sir Hartley Shawcross.

[3] *Notable British Trials*, William Hodge & Co.

It matters nothing whether he has received a large or a small fee nor indeed whether he has taken any fee at all. In former times it was regarded as something of a compliment to be selected by the presiding judge to take charge of the defence of a person unable to afford any fee. The provision of legal aid has taken the place of the old practice, but the position of the barrister remains the same.

The duty of defending counsel is by no means at an end when he has read the depositions and the instructions (if any), nor when he has interviewed his client. He is a lawyer and as such is bound to devote his legal knowledge as well as his other abilities to the service of his client. I well remember the pained surprise of Avory J., sitting in the Court of Criminal Appeal, when in answer to a question from the Bench why the point upon the indictment then being argued did not appear upon the transcript of the shorthand notes, he was informed by counsel, " My Lord, I did not take the point. I had not seen the indictment." The comment of that great judge was characteristic—" Mr. Blank, when I was at the Bar I should not have dared to defend a prisoner without seeing the indictment against him." Do not let the neophyte make the mistake of supposing that the comparative simplicity of the modern indictment or the increased powers of amendment given to the courts have abolished the old rules of pleading. A perusal of some recent decisions of the Court of Criminal Appeal should effectually disabuse the mind of anyone inclined to fall into that error.

Too much time can hardly be devoted by the criminal lawyer to the study of the law of evidence, which is perhaps the branch of the law most often discussed in criminal courts, and it is a matter of common knowledge that in criminal cases the law is more strictly enforced than in civil ones.

Do not object to evidence doubtfully admissible merely for the sake of objecting. A jury is apt to be suspicious of any attempt to keep from them what may be the very thing they wish to hear. As a rule, the defence would be well-advised to confine their efforts to preventing anything being given in evidence which may injure the accused. On the other hand, do not be deterred from taking any objection, if you think your point is a good one, by the fact that you have heard similar evidence given in other cases without objection.

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[4] *Notable British Trials*, William Hodge & Co.

Merely as a topic possibly worth consideration let me draw your attention to a feature of modern trials, *viz*., the large number of cases in which the strength of the case for the Crown is to be found in an alleged voluntary confession made by the accused to a policeman usually at a police station, and often leading to a plea of guilty on the advice of counsel. Sixty years ago, when I started to attend the sessions of the Old Bailey, there were very few pleas of guilty. Conviction was almost invariably followed by substantial punishment, since the majority of prisoners were of the "old lag" type who had little to hope for in the way of lenient treatment. Hence confessions to policemen were few and far between, and those which were admitted in evidence after objection were rarer still. Today the reverse is the case. I hope that nothing which I say will lead to captious objection being made to the admissibility of such confessions. All I would do is to advise the beginner to study with attention the remarks of Cave J. in delivering the judgment of the Court for Crown Cases Reserved in *R.* v. *Thompson* [1893] 2 Q.B. 12. I refer particularly to the last paragraph of the judgment to be found at p. 18.[5]

Of course, the police are not to be hampered in their efforts to secure the conviction of guilty persons, and no more satisfactory evidence of guilt can be conceived than a voluntary admission by the accused person. But what is meant by a voluntary statement? It may be observed that the matter is not concluded by the absence of a promise or threat, and there is nothing in the Judges' Rules to suggest that a confession obtained as the result of prolonged questioning in a police station, even though it is made under caution, is necessarily admissible against the person making it as being a voluntary statement. Indeed, such a confession was rejected by Channell J. in the case of *R.* v. *Knight and Thayre* (1905) 20 Cox 711.[6]

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[5] "I would add that for my part I always suspect these confessions, which are supposed to be the offspring of penitence and remorse, and which nevertheless are repudiated by the prisoner at the trial. It is remarkable that it is of very rare occurrence for evidence of a confession to be given when the proof of the prisoner's guilt is otherwise clear and satisfactory; but, when it is not clear and satisfactory, the prisoner is not unfrequently alleged to have been seized with the desire born of penitence and remorse to supplement it with a confession—a desire which vanishes as soon as he appears in a court of justice."

[6] In this case Knight, after being cautioned, had been questioned for nearly

Turning to the question of cross-examination I would say let it be as short as you can make it. Never put a question at random or without considering what you may be letting in by way of re-examination, and recollect the classic example of Mr. Phunky.[7] Charles Gill, the best cross-examiner I ever heard, used to prepare his questions with such infinite care that he scarcely ever put a question without knowing the answer and considering in advance the probable effect upon his case. He was not a particularly attractive speaker, but he got many verdicts in his time.[8] It is true that in those days the accused could not be called as a witness and therefore was unable to upset the defence so carefully prepared in the cross-examination by his counsel.

When it comes to his speech the young barrister will be given his head. He will be bound by no rules or regulations other than such as must apply to all speakers. He must not misrepresent either the evidence or the law but is free to put his client's case in the most attractive light possible. He will be well advised to ignore the belief in the virtues of prolixity evinced by the Bellman in the line from the *Hunting of the Snark*: "What I tell you three times is true" though some slight repetition is perhaps more excusable in a speech to a jury than in an argument to a judge.

Now let us consider for a few moments the position of the beginner whose first brief happens to be one for the prosecution instead of the defence. The first thing which I wish to impress upon counsel for the Crown is that he represents an aspect of the case quite as important for the consideration of the jury as the defence of the accused person. He is not briefed merely to examine witnesses for the prosecution who were called at the police court. The case is not to be tried upon the depositions, which are not prima facie admissible in evidence or proof of anything, but upon the materials laid before the jury by the prosecution and defence respectively.

Counsel for the Crown is in charge of the case for the prosecution though it is true to say that he exercises his functions in some

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three hours about a criminal charge by an authorised clerk from the Post Office. At the trial the questions and the answers made by the prisoner at the interview were tendered in evidence. Channell J. held that statements made immediately after the caution were admissible, but that later questions and answers were not, since it seemed that the prisoner after being questioned at such length might have been worried into making untrue statements in order to put an end to an intolerable position.

[7] See *Pickwick Papers*, Chap. 34.

[8] Trial of Samuel Dougal (1903), *Notable British Trials*, William Hodge & Co.; Trial of Oscar Wilde (1895), *Notable British Trials*, William Hodge & Co.

respects more under the supervision of the court than does his opposite number. He will study the indictment if he has not been consulted in the settlement of it, particularly such counts in it as may be described by the term alternative, and make any preliminary submission to the court which he thinks right with a view to the simplification of the issues to be laid before the jury.

Simplicity is always an advantage for the prosecution ; complication and confusion are dangerous weapons in the hands of the defence. His task will include the consideration of such matters as the desirability of calling, after due notice, additional evidence for the Crown and the preparation of the argument to be addressed to the judge, together with the authorities to be cited upon any question of law expected to arise. The greatest criminal lawyer of modern times, the late Sir Harry Poland, used to say that the first duty of prosecuting counsel (or the junior where there are two) is to " stop up the earths." No one can tell with certainty by which hole the fox will endeavour to escape, and he is not called upon to state his intentions in advance.

Counsel for the Crown also has the right at the close of the evidence, if the accused is represented by counsel, to sum up the case for the prosecution. That right, expressly conferred by the Criminal Procedure Act in 1865 and formerly freely exercised became of even greater importance by reason of the Criminal Evidence Act of 1898 which allowed the accused to give evidence on his own behalf. For my part I fail to understand the apparent reluctance of counsel for the prosecution in recent years to avail themselves of it.

I am not here pronouncing as a judge upon the law and it may be that others differ from me. I am merely stating my own view of the right practice as the result of a life-long connection with criminal trials. The admonition *audi alteram partem* may have been originally addressed to a judge, but it embodies a requirement fully as important to be remembered in connection with trial by jury. The jury is entitled and ought to hear argument from both sides upon any question left for their decision. If the case for the Crown has never been put before them except in the disjointed form of the evidence of the various witnesses, the presiding judge when he comes to sum up is put in a most invidious position. He desires presumably to put fairly before the jury the arguments on both sides, but if no argument has been addressed to the jury on behalf of the prosecution, the judge is forced to present what he understands would be their answer to the arguments for the defence, and to that extent ceases to be the umpire and is apt to be regarded as a partisan, since it is generally recognised that an argument advanced or a view expressed from the Bench carries far more weight than a similar statement by counsel. That the case for the Crown, as distinct from the details of the evidence, should be stated at some stage of the case must indeed be obvious to everyone.

Now, the opening of the case by counsel for the Crown usually affords no such opportunity. An opening speech should, and generally does, consist of a reference to the charges in the indictment and the possible verdicts to be returned, followed by an outline of what the prosecution expects to be able to prove. When opening a case, questions of law such as the onus of proof may be left for the judge to deal with, and matters of defence to those whose duty it is to raise them. Dissertations upon the meaning of reasonable doubt are better omitted altogether. Argument on the facts should be reserved to the time when the evidence has been given, and it is then that it is valuable.

In many cases the summing-up need only consist of a few sentences; in the simplest cases it may be omitted altogether; but the modern practice, if there be a practice, of leaving the jury quite at sea as to the attitude of the Crown to the matters which have been brought out in cross-examination or evidence, and which will be relied upon by the defence, seems to me to be wrong from every point of view.

It is happily unnecessary in these days even to consider the question of the attitude of the Bar to the Bench. English barristers adopt and carry on almost instinctively the traditional respect shown by the Bar to the rulings of the Bench. It has always been so in my experience, at least so far as the judges of the High Court and the permanent judges at the Central Criminal Court have been concerned. It is indeed a natural and necessary attitude to adopt in a country where Mr. A. is sitting as a judge, let us say as Recorder, today and as such ruling upon the submission of Mr. B. as counsel, while tomorrow Mr. B. as chairman of quarter sessions may have to deal with a precisely similar submission on the part of Mr. A. In some courts relations were not always so pleasant. During the first twenty years or so of my practice at the Bar there was no right of appeal by persons convicted on indictment either against conviction or sentence. Persons sent to prison by magistrates had enjoyed some such rights for nearly thirty years, but the decisions of juries were regarded as final and the law made no provision for the relief of the man whose conviction proceeded upon a misdirection by the presiding judge.

Now, a substantial proportion of the chairmen and deputy chairmen of quarter sessions had no more than a perfunctory knowledge of criminal law; and we all know that a little learning is a dangerous thing. Even in those days I do not believe that an innocent man was in any real danger of conviction at the hands of a jury. If judges were, as a whole, more apt to side with the prosecution than they are at present, juries were more reluctant to find a verdict of guilty, more easily swayed by the eloquence of counsel, and just as determined as they are today not to be persuaded by anyone, on or off the Bench, into convicting an accused person contrary to what they themselves believe to be the justice of the matter.

It was, I believe, the insistence upon the right to an independent and undictated verdict of a jury which gave rise to most of the clashes between the Bench and Bar in those now far-off days. Such exhibitions came to an end upon the creation of the Court of Criminal Appeal. That blessed word—misdirection—affords a far wider avenue of escape than an appeal to the Home Secretary or a Case, if one could get it, for the Court for the Consideration of Crown Cases Reserved.

While on the subject of the relations between Bench and Bar, let me remind the young advocate that his duty is to argue *to* not *with* the judge. Once your point has been put and ruled upon, sit down. If your objection has been wrongly overruled or your application improperly refused, your client has his remedy in the Court of Criminal Appeal. Put your point once only but put it clearly. It may help you if you get into the habit of using the expression " My proposition of law is " so and so, or " My submission in law is." The use of such legal terms will tend to clarify in your own mind the proposition of law upon which you are asking for a ruling. No effective argument ever yet came out of a muddled head. Never make the mistake of saying what your own belief or opinion may be. The expression " I think " should be banished from the vocabulary of the advocate.

You will of course be fair on whichever side you may be briefed. If you are for the Crown you will naturally be fair to the accused. If you are for the defence, remember to be fair to the witnesses for the prosecution. Bullying has gone out of fashion, I hope, for ever. Unfairness will never lead to success, for judges and juries instinctively dislike it, so it may be said that in the long run fairness pays, though it is not on that account alone that I recommend it. Be fair but firm. Fairness and flabbiness are not inter-changeable terms. While being scrupulously fair to the other side, remember that you are briefed to see that your client's case is fully placed before the jury. When you have done that you will have performed your duty, no more and no less.

# *The Administration of Criminal Justice in Northern Ireland*

By J. Ll. J. Edwards

*Reader in Law in the Queen's University of Belfast*

## Courts of Summary Jurisdiction

*Professional magistracy and lay justices of the peace*

Without question the most striking development in the administration of the criminal law in Northern Ireland occurred when the Summary Jurisdiction and Criminal Justice Act (N.I.), 1935,[1] virtually put an end to the system of conducting petty sessions through the medium of lay justices and created, in its place, a professional magistracy.[2] The example provided by this radical innovation did not commend itself, however, to the Royal Commission on Justices of the Peace, which, in its report published some ten years later (Cmd. 7463 of 1948, paras. 213–214), advanced several reasons against the introduction of a similar measure of reform in England. In attempting to draw any lessons from the change in Northern Ireland it may be as well to remind ourselves of the Royal Commission's views on the problem. In the first place, it was argued that it would be impossible to find the large body of stipendiary magistrates equipped with the necessary qualifications of judicial temperament, knowledge of the criminal law and of the world. Secondly, the existing system in England was said to be commendable because, like trial by jury, it gave the ordinary citizen a part to play in the administration of the law. Thirdly, it prevented the growth of a suspicion in the ordinary man's mind that the law is a mystery which must be left to a professional caste and has little in common with justice as the layman understands it.[3]

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[1] Prior to 1935, lay justices could sit in petty sessions alongside the resident magistrate, with no restrictions as to number. Normally, however, the resident magistrate exercised jurisdiction alone, the attendance of lay justices being sporadic; but since decisions were determined on a majority vote it was not unusual for a large number of lay magistrates to attend in controversial cases, occasioning the suspicion that decisions were not always reached on the merits.

[2] Originally styled "stipendiary magistrates," their lineage dates back to the Constabulary Force in Ireland Act, 1836, ss. 31–33, under which certain salaried magistrates could be appointed. The title "resident magistrate" first appeared in 1853, see 16 & 17 Vict. c. 60.

[3] A view supported by Lord Evershed M.R., (1956) 120 J.P.J. 51.

Finally, it was urged that cases involving questions of fact ought not to be left to one man, the example being given of a High Court judge who is never asked to undertake the heavy responsibility of trying a criminal case except with the assistance of a jury of laymen.

This is not the time to consider in detail the merits of the Royal Commission's reasoning. The first argument is a very real one but it has not presented any difficulty in Northern Ireland. With a population of 1,393,800, a total of ten permanent resident magistrates, supplemented on occasion with a small panel of temporary resident magistrates, have been found quite adequate to deal with all matters, both criminal and civil, which come before the Northern Ireland courts of summary jurisdiction. As for the other reasons expressed in the Report, one personal observation may be permitted, namely, that during the time the present writer has been resident in the Province he does not recall a single instance in which adverse comment has been made along the lines suggested in the Royal Commission's report. Furthermore, so far as he is aware, the " heavy responsibility " of trying summarily either petty or indictable crimes does not occasion the Northern Ireland resident magistrate any greater hardship than his stipendiary or metropolitan colleague in England. There is also the general feeling that the independence of the resident magistrate more than compensates for the absence of a body of lay justices who, otherwise, would determine the issue of guilt or innocence.

### *Qualifications for appointment as resident, stipendiary or metropolitan magistrate and tenure of office*

This independence springs largely from the security of tenure of office which a resident magistrate enjoys by virtue of the Summary Jurisdiction and Criminal Justice Act (N.I.), 1935, s. 6 (2). Under the terms of this enactment every resident magistrate holds office during his good behaviour, and may only be removed from office by the Governor upon the address of both Houses of the Northern Ireland Parliament. Much discussion has recently taken place in this *Review* (see [1955] Crim.L.R. 235, 395, 586–587, 721–722) concerning the position of Colonial High Court judges, and it would be interesting to learn of any parallel to the exceptional position enjoyed by Northern Ireland resident magistrates, who are accorded the same security of tenure as that normally associated with judges of the Supreme Court. The only difference, as will be seen later, is in the forum on whose joint address a judge or resident magistrate may be removed, a distinction which is readily explained by the provision in the Government of Ireland Act, 1920, s. 47 (1), which reserves to the Westminster Parliament matters relating to the Northern Ireland Supreme Court. It is worth adding here that, in theory at least, stipendiary and metropolitan magistrates in England and Wales do not enjoy the same security of tenure. Thus, under the Metropolitan Police Act, 1829, s. 1, a metropolitan magistrate holds office " during the pleasure of the Crown," and the Justices of the Peace Act, 1949, ss. 29 and 31, makes a similar provision in respect of stipendiary magistrates, but adds the important caveat that removal from office shall only take place on the recommendation of the Lord Chancellor.

Qualifications for appointment to these respective judicial offices provides another interesting basis for comparison. In Northern Ireland either a practising barrister or solicitor of not less than six years' standing is eligible for appointment as a resident magistrate, the power of recommendation to the Governor being vested in the Minister of Home Affairs. In England and Wales, on the other hand, stipendiary magistrates, until fairly recently, could only be appointed from among the ranks of barristers. However, following a recommendation of the Royal Commission on Justices of the Peace (Cmd. 7463 of 1948, para. 230), provision was made in the Justices of the Peace Act, 1949, ss. 29 and 31, for the appointment of stipendiary magistrates from among either barristers or solicitors of not less than seven years' standing. Another proposal of the Royal Commission (*ibid.*, paras. 228, 229), that responsibility for advising the Crown on the appointment of both stipendiary and metropolitan magistrates should be transferred from the Home Secretary to the Lord Chancellor, met with only partial success. This reform was instituted in the case of stipendiary magistrates, so that in such cases the power of appointment and removal now lies with the Lord Chancellor, but the Home Secretary still continues to exercise control over the metropolitan magistrates. The apparent justification for this latter anomaly is the unwillingness of the Home Office, which is responsible for all the administrative side of the metropolitan magistrates' courts, to separate from its overall control the power of recommending appointments to, and removal from, the Bench in those courts. Presumably, the same reasons motivated the Northern Ireland legislature in giving the Minister of Home Affairs control over the appointment of resident magistrates, but it will be recalled that in Northern Ireland the removal of a resident magistrate from office cannot be effected by Executive action alone, the sanction of Parliament being an indispensable condition for removal.

### *Functions still performed by lay justices*

Earlier in this article it was stated that since 1935 the responsibility for administering petty sessions in Northern Ireland had passed out of the hands of justices of the peace. It may be wondered, therefore, whether any functions remain to be performed by those lay persons whose names continue to appear on the various commissions of the peace for the Province. It should, perhaps, be added that new justices continue to be appointed periodically, so that there is, at present, no likelihood of the office of justice of the peace falling into desuetude in Northern Ireland. Among the purely administrative duties still exercisable under the provisions of the Summary Jurisdiction and Criminal Justice Act (N.I.), 1935, s. 3 (2), are the signing of summonses, issuing of search and arrest warrants, administering oaths, and the taking of affidavits. In addition, on the judicial side, a justice of the peace continues to have power to bind persons over to keep the peace and/or to be of good behaviour, to decide cases of drunkenness, and, by virtue of the Criminal Justice Act (N.I.), 1953, s. 13, to authorise the taking by a constable of the finger-prints of a person who has been charged with an offence and is in lawful custody. Jurisdiction in cases of vagrancy was withdrawn under the Summary Jurisdiction Act (N.I.), 1953, s. 30. There remains, however, the important power of a lay justice to hear evidence and take depositions in cases where a person is charged with an indictable offence; and, on such occasions, the justice of the peace has the same jurisdiction as a resident magistrate. He may remand the accused from time to time either in custody or on bail, he may exclude the press and the public or prohibit publication of the proceedings (see [1956] Crim.L.R. 152), and, at the conclusion of the preliminary hearing, the lay justice may either dismiss an information against the accused or commit him for trial. Moreover, this inherent power of lay magistrates to decide whether a prima facie case has been made out for committing an accused person for trial is not merely of historical interest in Northern Ireland. In the large towns, where a resident magistrate is readily available, it is naturally customary for him to take charge of such preliminary proceedings; but elsewhere this duty is frequently performed by lay justices of the peace.

### *Summary trial of indictable offences and powers of punishment*

With the administration of justice in the Northern Ireland petty sessions conducted exclusively by professional magistrates one might expect the list of indictable offences which may be dealt with summarily to be more extensive than under English law. In fact, the tendency has been for Northern Ireland legislation on this subject to follow closely the corresponding enactments in England. Thus, an examination of the Second Schedule to the Summary Jurisdiction Act (N.I.), 1953, which contains the list of indictable crimes committed by adults which may be dealt with summarily on the consent of the accused, shows the following omissions only from the corresponding First Schedule to the Magistrates' Courts Act, 1952—misdemeanours under the Coinage Offences Act, 1936, and offences under the Falsification of Accounts Act, 1875, and the Telegraph Act, 1868, s. 20. For no apparent reason there is the added difference that whereas in Northern Ireland cases of indecent assault on females only are triable summarily, the Magistrates' Courts Act, 1952, enables petty sessions in this country to deal with charges of indecent assault upon any person, whether male or female, but only in cases where the victim of the assault is under sixteen.

One further notable distinction between the two jurisdictions is the absence in Northern Ireland law of any power, similar to that created in the Criminal Justice Act, 1948, s. 29, and since perpetuated in the Magistrates' Courts Act, 1952, s. 29, to commit an adult prisoner (*i.e.*, a person over seventeen years) to quarter sessions for sentence, when such person has been convicted summarily of an indictable offence and the court is of opinion that, having regard to the prisoner's character and antecedents, its own powers of punishment are inadequate. Added emphasis to this omission in Northern Ireland law is the maximum sentence of six months' imprisonment and/or a fine of £25 which may be imposed by a resident magistrate on an adult prisoner in any such case, under the Criminal Justice Act (N.I.), 1945, s. 2. The policy underlying the Northern Ireland law is that it is preferable that the court which sentences a prisoner should be the same court which has tried his case. Accordingly, by s. 2 (4) (*c*) of the 1945 Act a resident magistrate may, at any time prior to his determination to convict *and sentence* the accused, reconsider his decision to deal with the case summarily; in which event, depositions will be taken. More extensive powers of punishment are conferred on resident magistrates where the person charged is a child (*i.e.*, a person under fourteen years) or a young person (*i.e.*, between fourteen and seventeen years). As in English law, under the Magistrates' Courts Act, 1952, ss. 20 and 21, so, too, in Northern Ireland under the Children and Young Persons Act (N.I.), 1950, s. 61, jurisdiction is given in such circumstances to try any indictable offence other than homicide, but with this difference. If the accused is under fourteen years and is the sole defendant, an English court of summary jurisdiction must try the case summarily, whereas in Northern Ireland the parent or guardian of the accused must consent before the case is dealt with by the resident magistrate. Furthermore, should the child or young person be convicted, a resident magistrate is empowered to impose the same punishment as might have been inflicted had the case been tried at assizes or quarter sessions (*ibid.*); and it is also significant that since the Criminal Justice Act (N.I.), 1953, s. 7,[4] was enacted a Northern Ireland court of summary jurisdiction can itself sentence a person between sixteen and twenty-one years to a period of training in a Borstal institution. This latter power may seem startling to an English lawyer for, as he is probably aware, our law contains no such provision; if such a sentence were thought desirable by a court of petty sessions in this country it must commit the prisoner to quarter sessions for sentence.

## Courts of Quarter Sessions

### *Amalgamation with county courts*

Another novel feature of the inferior courts in Northern Ireland is the amalgamation in each county of the court of quarter sessions and the county court. Unlike England and Wales, where the functions of a county court judge and that of chairman of quarter sessions are usually performed by two quite distinct individuals, in Northern Ireland it is the county court judge who presides over both courts and exercises the appropriate criminal and civil jurisdiction. This amalgamation is by no means a recent development, the system having originated in Ireland as far back as 1796, and it appears to have worked smoothly and efficiently ever since. There are five county court judges in all, of whom two hold the title of recorder, namely, the Recorder of Belfast, who is also the County Court judge and Chairman of Quarter Sessions for Co. Antrim, and the Recorder of Londonderry, who also occupies the position of County Court judge for Co. Londonderry. When acting as chairman of quarter sessions, the Northern Ireland county court judge sits alone and is not accompanied by the minimum of two lay magistrates which are essential in any English county sessions.

A further point of difference, of more than material significance, is the salary payable to the Northern Ireland county court judge, which, recently increased and now regulated by the County Courts

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[4] Before a resident magistrate imposes a sentence of Borstal training he is required to consider the now familiar report on the offender's physical and mental condition and suitability for such a sentence. Fears felt at the time when this new power of sentence was introduced, that it would be exercised inordinately, have proved to be unfounded.

Act (N.I.), 1955, s. 25, is intended to cover both the criminal and civil aspects of his judicial duties. It is, of course, true that even in this country recorders of borough quarter sessions are remunerated, but this can hardly be described as more than nominal payment for the judicial responsibilities involved. So far as the chairmanship of county quarter sessions in England and Wales is concerned, on the other hand, there appears to be a traditional aversion to making this office a salaried appointment; although special legislation does exist which provides for the payment of salaries in the counties of London, Middlesex, Lancashire and Hertfordshire (Cmd. 7463, p. 65). There are, however, a large number of county court judges in this country acting as " legally qualified " chairmen or deputy chairmen of quarter sessions, within the terms of the Administration of Justice Act, 1938, ss. 1 and 2. For example, at the time when the report of the Royal Commission on Justices of the Peace was published in 1948 thirty-five such judges were fulfilling this additional duty, but only as a voluntary service to the community.

### *Qualifications for appointment and tenure of office of presiding judge or chairman of quarter sessions*

Northern Ireland's adherence to the alternative system of full-time paid professional judges conducting quarter sessions is traceable back to the Civil Bill Courts Act (Ireland), 1796, ss. 2 and 17, in which provision was made for the appointment of part-time " assistant barristers," principally to hear minor civil claims but also to assist the justices at quarter sessions with criminal business. In that statute there is the curious provision that the assistant barrister should not act alone in criminal cases " until after twelve o'clock at noon," but in the later Civil Bill Courts (Ireland) Act, 1851, s. 2, such assistant barristers were empowered by virtue of their office to preside as chairman of the sessions and, moreover, to proceed with the criminal or other business " although no other justice of the peace for the county, riding or place shall be in attendance." The replacement of these part-time judges by the whole-time judges of today was effected by the County Officers and Courts (Ireland) Act, 1877, ss. 3 and 92. Since 1935, as already stated, a chairman of quarter sessions in the Province sits alone in that capacity, a system which is analogous to the position occupied by a recorder of an English borough quarter sessions. The parallel, however, must not be pushed too far, particularly when regard is paid to the qualifications for appointment to the respective offices. Thus, whereas in the case of a recorder in this country appointment is made from among barristers of at least five years standing, in Northern Ireland, by virtue of the 1851 Act referred to above, ten years' standing at the bar is the minimum qualification for appointment to the county court bench. In both appointments the path of elevation is closed to practising solicitors, and yet the chairmanship of county sessions in England and Wales is open to either barristers or solicitors of ten years' standing, who, for the purposes of the extended criminal jurisdiction conferred by the Administration of Justice (Miscellaneous Provisions) Act, 1938, are regarded as "legally qualified chairmen."

Some interesting facts are revealed, too, in connection with the respective conditions governing the tenure of these various judicial appointments. A recorder in England and Wales used to hold office during his good behaviour (Municipal Corporations Act, 1882, s. 163 (2)), but may now be removed from office by the Lord Chancellor for inability (Criminal Justice Administration Act, 1956, s. 13 (2)); a county court judge may be removed from office by the Lord Chancellor on the grounds of inability or misbehaviour (County Courts Act, 1934, s. 7 (1)). In Northern Ireland, on the other hand, the recorder or county court judge, whether acting in his capacity as a civil judge or chairman of quarter sessions, has always been able to regard himself as enjoying a greater measure of security than his English counterpart, and this state of affairs has been preserved by the Government of Ireland Act, 1920, s. 48. Two grounds for removal from office are provided by the Civil Bill Courts (Ireland) Act, 1858, s. 2, which is still the governing enactment in Northern Ireland. First, if the judge becomes incapable of discharging his duties by reason of "permanent infirmity"—the marginal note refers to "inability" but it is questionable whether this word conveys the sense of the section—he may be removed from office by the Governor on the advice of the Lord Chief Justice of Northern Ireland. Otherwise, the county court judge and chairman of quarter sessions holds office during good behaviour and may only be removed by the Crown on an address of both Houses of the Northern Ireland Parliament. Attention has already been drawn to the exceptional privilege in this respect enjoyed by resident magistrates in the Province; and it is now seen that similar treatment is accorded to the professional judges who preside over the civil and criminal business of county courts and quarter sessions. Little attention is normally given to this form of statutory protection, which seems designed to establish the independence of the judiciary in the inferior courts of Northern Ireland. It speaks highly of the calibre of members of the Bench in these courts that the relevant statutory provisions remain, as it were, a dead-letter.

### *Offences triable at quarter sessions*

A further manifestation of the prestige accorded to courts of quarter sessions in Northern Ireland is clearly to be seen in the wide jurisdiction exercisable by these courts. As is well known, in England and Wales both county and borough sessions are deprived of the power of trying the graver felonies and misdemeanours. The main enactment limiting their jurisdiction is the Quarter Sessions Act, 1842, but this statute has never been extended to Ireland. And although the Administration of Justice (Miscellaneous Provisions) Act, 1938, made provision for a number of additional offences to be cognizable by quarter sessions in this country when the court is presided over by a legally qualified chairman, the fact remains that a considerable body of crimes is still excluded from the jurisdiction of these courts.

With the pressure of business to which many assize courts are nowadays subjected, it would seem worth considering whether the calendar of crimes included in the Schedule to the 1938 Act should not be extended. The Northern Ireland legislature, in contrast, appears to have greater confidence in its courts of quarter sessions, probably on account of their being presided over by full-time judges. Be that as it may, the jurisdiction of these courts has recently been widened for under the Criminal Justice Act (N.I.), 1945, quarter sessions in the Province may now try cases of incest, fraudulent conversion, child destruction, offences under the Prevention of Corruption Acts, 1889 to 1916, common-law forgery and all the offences under the Forgery Act, 1913. Also, the Perjury Act (N.I.), 1946, confirmed the jurisdiction of quarter sessions to try cases of perjury, subornation of perjury and any offence under any enactment which is made punishable as perjury.[5] No difficulty appears to have arisen through the non-application in Northern Ireland of the Quarter Sessions Act, 1842. For, although this omission theoretically confers well-nigh unlimited jurisdiction upon the courts of quarter sessions in Northern Ireland, there has developed a well-established practice to reserve certain cases for the assizes, either on account of the magnitude of the punishment or any difficult points of law which might be involved. This practice serves to exclude murder, other capital crimes, and those felonies or misdemeanours which might be described as political or insurrectionary in character; high treason, and misprision of treason are excluded at common law. These limitations apart, it is suggested that a study of the list of crimes which are outside the purview of English quarter sessions (see Archbold, 33rd ed., pp. 94–97) shows that our law might have something to learn in this respect from the experience of Northern Ireland.

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[5] Similar doubts as to the jurisdiction of quarter sessions in Ireland to hear and determine cases of perjury at common law were resolved affirmatively as long ago as the Perjury Act (Ireland), 1791, s. 13.

## Assizes and the Court of Criminal Appeal

### *Smallness of Supreme Court judiciary and the consequent interchanging of judicial duties*

A word is necessary first about the Supreme Court of Judicature of Northern Ireland which was established under the provision of the Government of Ireland Act, 1920, ss. 38 and 40, and which consists of the Court of Appeal and the High Court of Justice. The Lord Chief Justice is President of both courts, and there are two Lords Justices of Appeal and two puisne judges. Unlike this country, where it would be unheard of for a member of the Court of Appeal to go on circuit and conduct assizes, in Northern Ireland, owing to the limited size of the judiciary, it is customary for each of the Supreme Court judges to receive in turn the ancient commissions of assize, oyer and terminer and of gaol delivery, and to visit each county town in the Province twice a year to hold the Spring and Summer Assizes, at which civil business is also transacted. Two judges make the circuit together, and in the first county to be visited the senior of the two judges takes the criminal cases, the civil business being dealt with by the junior. In the next county, the roles of the two judges are reversed and so it continues to the end of the circuit. The whole of the six counties are combined for the Winter Assize, which is held each December in some specified county town and deals only with criminal cases. Entirely outside these arrangements, however, stands the County Borough of Belfast, in respect of which a special commission of oyer and terminer and general gaol delivery is issued four times annually, and this Belfast city commission, as it is called, is usually presided over by a judge of the Supreme Court.

No difference from English law exists so far as the security of tenure of the Northern Ireland Supreme Court judges is concerned. Although the Act of Settlement, 1700, did not apply to Ireland, similar provision to that contained in the English statute and now embodied in the Supreme Court of Judicature (Consolidation) Act, 1925, s. 12 (1), was introduced in the Independency of the Judges Act (Ireland), 1781. This latter measure, in turn, has been continued in force in Northern Ireland by the Government of Ireland Act, 1920, s. 61. Megarry, in his *Miscellany-at-Law*, pp. 15–18, gives a brief but absorbing survey of the many abortive proceedings instituted over the years to remove various judges of the High

Court by the procedure of a joint address of both Houses of Parliament to the Crown, and, as the author points out, the Irish judges in the last century seem to have been especially unfortunate in this respect. Indeed, the only instance of a successful attempt to remove a High Court judge appears to have occurred in 1830 when Sir Jonah Barrington, an Irish Admiralty judge, was thus removed from office; and only a fortunate change of government in 1805 appears to have saved another Irish judge, this time of the Court of Common Pleas, from suffering a similar indignity.

From what has already been said about the small size of the judiciary it is not surprising to find that all five judges of the Supreme Court are constituted judges of the Northern Ireland Court of Criminal Appeal, which was established by the Criminal Appeal (N.I.) Act, 1930. This enactment is modelled on the Criminal Appeal Act, 1907, having identical provisions with regard to such matters as the grounds for appeal, the determination of appeals, legal aid, the calling of witnesses, delivering of single judgments, and the remission of royal prerogative cases to the court by the Minister of Home Affairs for Northern Ireland. Unlike the English Court of Criminal Appeal, however, which requires a minimum of three, and always an uneven number of, judges for the court to be properly constituted, the Northern Ireland Act provides for the possibility of a court of two judges. The requirement in the English Act of 1907 for an uneven number of judges was probably inspired by several unsatisfactory decisions of the Court for Crown Cases Reserved, in which the principle was applied that where the appellate judges were equally divided then the conviction in the lower court stood. This iniquitous rule is also rightly by-passed in the Northern Ireland statute, which states that where two judges sit as the Court of Criminal Appeal and those judges disagree the case shall be reheard by three judges and then the decision will be reached according to the opinion of the majority of the members of the court. If this scheme is thought to be cumbersome, regard should be had to the practical difficulties involved where only a small judiciary is available to deal with the every-day business of the High Court, the somewhat less frequent sittings of the Court of Appeal and the Court of Criminal Appeal, and the regular duty of going on circuit. In the circumstances, it is suggested that the solution is the best possible. Precisely the same difficulties have recently led to a change in the process of appeals by case stated which will be considered in a further article.

(*To be concluded*)

# *Narcotic Addiction in the United States*

By REX COWAN, LL.B., *Solicitor,* and LEW FRANCIS, B.A.

The recent controversy over the now abandoned government ban on heroin has revived interest in a problem which, although of small importance in this country, is an increasing danger in other countries, particularly the United States. Like alcohol, narcotics provide an escape from personal difficulties for those who are psychologically incapable of coping with life. The social effects of addiction are disastrous and cure is difficult, as the disappointing results of the two United States Federal Narcotics Hospitals show. The degenerating effects on the human constitution, together with the release of restraints and inhibitions, which follow addiction to most types of narcotics present a serious problem for law enforcement officers.

Whilst it is comparatively simple to remove the physical dependence upon narcotics, the psychological dependence is immeasurably greater and more difficult to uproot. There are instances on record in the United States of addicts returning to the use of drugs within an hour or so of release from jail or hospital, even though the drug had been successfully withdrawn and the physical dependence eliminated.

Marijuana and heroin are probably the two major narcotics in use in the United States today. The figures quoted below make the recent estimate of fifty-two known heroin addicts in the United Kingdom appear tiny by comparison. Crime sometimes accompanies the release of inhibitions which follows the smoking of marijuana, whilst the heroin addict, desperate for an injection, will commit any illegal or dishonest act to obtain the necessary dose. Large criminal syndicates often handle the illegal importation and distribution of drugs at immense profit. The heroin addict may build up his body tolerance to a point where he requires five grains a day administered intravenously or must suffer extreme pain and discomfort. These illegally obtained drugs may cost him £70 a week. Usually if he is a male he will resort to criminal activities to provide him with such immense sums, if a female, to prostitution.

### *Extent and types of addiction*

As may be expected, statistics pertaining to the number of narcotic addicts are difficult to obtain, as much addiction is secretive and never comes to the attention of the authorities. Commissioner Anslinger of the U.S. Federal Bureau of Narcotics estimates that there are about 60,000 narcotic addicts in the United States at the present time. The majority are to be found in the larger cities, predominantly in the lower socio-economic groups. The U.S. Government has established hospitals under the jurisdiction of the Public Health Service at Lexington, Kentucky, and Fort Worth, Texas, for narcotics users. In addition, some states provide medical and psychiatric treatment for the addict in state hospitals for the mentally ill. A very generous estimate of the number of cures effected is about 5 per cent. of users treated in hospitals. Some private psychiatrists claim a higher proportion of cures. Alcoholics Anonymous, which has done much effective work with alcoholics, has now entered the field of drug addiction. The Federal law as embodied in the so-called Harrison Narcotics Law requires registration and payment of a graduated occupational tax by all persons who import, manufacture, produce, compound, sell, deal in, dispense or give away narcotic drugs. Individual states also have similar laws completely prohibiting illegal use of various drugs. In most places, the use of heroin is illegal, even in legitimate medical practice. The enforcement of narcotic laws is difficult because it usually requires the individual to be apprehended with narcotics in his possession or under his control. Importers are aware of this, and thus the drugs pass rapidly from hand to hand. The importer brings the drug into the United States in fairly large quantities, sells it to " wholesalers " who after dilution pass it on to the " pushers," who may themselves be addicts relying upon their profits to pay for their personal consumption. Frequently, in the case of heroin, the drug is so diluted with milk sugar that by the time it reaches the user it may contain only 5 per cent. pure heroin. Where the legal use of drugs for medicinal purposes is carefully regulated by state law, doctors, hospitals, and pharmacies are held strictly accountable for their supplies. By far the greatest traffic in narcotics is across the border from countries which are adjacent to the United States. The enforcement agencies are hampered by inadequate staffing properly to inspect the flow of traffic and merchandise at points of entry into the U.S. As an example of the extent of the traffic, the U.S. border between California and Mexico is crossed by approximately 50,000,000 pedestrians per year and 2,500,000 cars with an average of three passengers. Only thirty federal agents control this border.

Narcotics enter the United States also from Canada. Communist China is believed to be a principal supplier.

The drugs that constitute the major problem in the U.S. are opium and its derivatives, morphine and heroin, and marijuana, which can be grown in many parts of the U.S. Synthetic drugs such as benzedrine, a stimulant, and those in the barbiturate group, which are hypnotics, are being used more extensively, often as an introduction to the more potent drugs. Drugs of this group are commonly referred to as " goofballs." Opium is of declining importance in the United States, its present use being almost exclusively limited to persons of Oriental origin. Marijuana, a stimulant which is cheaper and more easily obtained, does not create physical addiction; there is no bodily increase of tolerance to its use, and no withdrawal symptoms when the use of the drug is terminated. Its effect on the user is unpredictable, and whilst under its influence he may succumb to a delirium, accompanied by hallucinations, an increase in the imaginative function, and a loss of sense of time and dimension. Criminal assaults may occur in this state.

Heroin is the most serious and disastrous of the opiate group of drugs. It is a cerebral and spinal depressant. Initially, it may be assimilated into the system orally or by inhaling. It has a relaxing effect, and during the period it is retained in the system the user is in a lethargic and tranquil state. As the body builds up tolerance to the drug larger quantities are necessary to keep at normal operating level. In order to ensure the maximum effect, the solution must be injected intravenously. Some users who do not possess hypodermic syringes have been known to cut open their veins with a pin or razor blade and drop the heroin solution directly into the bloodstream. As the blood vessels break down around the areas of constant use, the addict seeks new areas on his body, and it is characteristic of long term users that scar tissue is to be seen extending over large areas of their bodies.

When the drug is not available, withdrawal symptoms develop. The addict becomes tense and nervous, his nose and eyes run, and he develops muscular spasms and vomiting. At this state he becomes desperate and ready to commit any act of violence or dishonesty in order to procure the desired drug. When treated medically, sedatives and hypnotics are used to assist him over the difficult period of withdrawal.

The penalties in connection with the use and peddling of narcotics vary up to the maximum of life imprisonment. For persistent offenders a prison sentence of from ten to twenty years is not unusual in some states. However, the peddler of drugs is more heavily penalised than the plain user. Owing to the low rate of success with the present methods, the problem of recidivism is increasing and there is small doubt that the present laws and their enforcement are not meeting the problem. Many states are studying the position with a view to setting up adequate facilities for the treatment of addicts, both those committed by the courts and others who submit voluntarily. The legal prescription of limited quantities of drugs to known addicts by registered medical practitioners is almost unknown in the U.S. Probably the most serious aspect of addiction in the U.S. is the large number of juveniles who have been introduced to narcotics, generally of the barbiturate group and marijuana, and who graduate from these to become full-time heroin users.

# *Practice and Procedure*

## Queen's Bench Division

### *Mandamus and case stated*

Under section 87 (6) of the Magistrates Courts Act, 1952, which re-enacts the previous law, it is provided that where the justices refuse to state a case the High Court may on the application of the person who applied for the case to be stated make an order of mandamus requiring the justices to state a case. It is well understood that the issue of the order is discretionary and with discretion would appear to come a certain amount of uncertainty. In *R.* v. *Churchwardens of All Saints, Wigan* (1876) 1 App.Cas. 611 at p. 622 Lord Hatherley states that: " Upon a prerogative writ there may arise many matters of discretion which may induce the judges to withhold the grant of it—matters connected with delay or possibly the conduct of the parties." But in the same case at p. 620 it is stated by Lord Chelmsford: " So in cases where the right, in respect of which a rule for mandamus has been granted, upon showing cause appears to be doubtful, the court frequently grants a mandamus in order that the right may be tried upon the return; this also is a matter of discretion." Even where the justices' decision is wrong in law where a person upon whom a nominal penalty should have been inflicted has been acquitted by the justices, the court may decide not to require a case to be stated (*R.* v. *Davey* [1899] 2 Q.B. 301). From this an interesting point arises. In these cases the court has been dealing with the surrounding circumstances of the case—delay, the conduct of the parties, the insignificance of the issue. It may happen that the point of law raised in the application for a case stated is that the justices have come to a decision to which no reasonable bench of magistrates could come, in that the justices had come to a decision of fact which there was no evidence to support. This is prima facie a point of law upon which a case could be stated (*Bracegirdle* v. *Oxley* [1947] K.B. 349; *Jenkins* v. *W. J. Brookes & Sons* [1956] Crim.L.R. 262).

If the justices refuse to state a case and an application is made for an order of mandamus the unusual position arises that if the merits of the case are examined and the balance of the facts weighed the court are in effect taking the place that the Divisional Court would after the case has been stated, and determining whether the balance of evidence is sufficient to justify an appeal. At the same time if mandamus is refused for outside considerations, *e.g.*, delay and insignificance, the issue which would appear initially one of law is being determined on the basis of discretion. If on an application for leave and on the subsequent application by notice of motion to the Divisional Court, they are to act other than ministerially in passing the case on for determination the court must have regard to the facts of the case. If the issue of mandamus, however, is to be automatic in such cases then the costs of the additional procedure required to enforce a statement of case would appear heavy and in logic strictly unnecessary. At the same time a distinction has to be drawn between the duty of the court on an application for mandamus and the court on hearing a case stated; the one determines whether a case should be stated, the other whether in law the appeal shall be granted once the case has been stated. [R. P. C.]

## Magistrates' Courts

### *Detention centre for young persons*

Home Office Circular No. 37/1956 dated March 15, 1956.

I am directed by the Secretary of State to refer to Home Office Circular No. 167/1952 of August 15, 1952, notifying the availability of the detention centre at Campsfield House, Kidlington, Oxfordshire, for the reception from your court of male persons who have reached the age of fourteen but not the age of seventeen years, and to say that the following observations made in the light of the experience of the working of this centre since its opening in August, 1952, may be of value to the justices in selecting cases from this age group for detention-centre treatment.

*Selection of cases.* As stated in the Home Office Circular of August 15, 1952, it has been assumed that courts will ordinarily impose a period of three months' detention which is laid down (subject to certain exceptions) in section 18 (1) of the Criminal Justice Act, 1948, and in the case of a young person found guilty of an indictable offence, this would seem to be the maximum which can be imposed by a court of summary jurisdiction, having regard to the provisions of section 20 of the Magistrates' Courts Act, 1952.

The comparative shortness of this period does not allow a course of long-term progressive training, whether of skill or character, comparable with that given in approved schools and Borstal institutions. It follows that those judged to be in need of extended residential training cannot suitably be sent to a detention centre, nor can those who need to be removed for a fairly long period from their homes or from undesirable associations. Experience suggests that the régime of the detention centre is most effective in the case of boys to whom a strictly regulated institutional life is entirely new, and that it is rarely successful in the case of a boy who has already failed to respond to training in an approved school.

While it is not yet possible to define in precise terms, on the basis of theory or experience, the type of boy who is likely to benefit by treatment at the centre, it is at least clear that careful selection is the key to success. For certain classes of boy, notably those who have already undergone long-term institutional training, have appeared many times in juvenile courts, show symptoms of maladjustment or more serious mental disturbance, are dull and backward, or are physically unfit for strenuous exercise, detention centre treatment is generally found to be unsuitable. The most hopeful category is perhaps that of the well-developed, undisciplined young " rough " who has hitherto come off best in his conflicts with authority, and without having developed a bent for crime, requires to be taught a lesson, through an unpleasant experience and enforced discipline, that interference with other people and their property will be dealt with firmly and inescapably by society. Though such cases are not particularly common in the juvenile courts, it may be appropriate to remind justices that the category of cases for which junior detention centres were intended to provide was not a wide one, and that the use of detention as a substitute for long-term training is seldom likely to be successful and may indeed prejudice the prospects of success of such training at a later stage. The description of the régime included in the Seventh Report of the Children's Department (paragraphs 195 to 198) may be useful to justices who have not visited the detention centre in deciding whether detention is appropriate in a particular case; and these paragraphs are reproduced as an appendix to this circular.

*Physical and mental fitness.* It is also important that a boy committed to a detention centre should not be suffering from any physical or mental disability that would prevent him benefiting from the treatment. He should be physically and mentally fit to take part in the physical training, hard work and the vigorous activities of the centre. Reports on health will normally be provided for the juvenile court by the local authority in pursuance of section 35 (2) of the Children and Young Persons Act, 1933 ; but if the court is unable to decide whether or not a boy is fit for the régime, it is possible, of course, to obtain a fuller report by remanding for medical examination.

*Provision of information to the courts.* Since committal to a detention centre is a comparatively new form of disposal, courts may find it of value to know how boys committed by them responded. The warden at the detention centre will, at the request of the court be prepared to furnish a report for the information of the justices on the completion of a boy's period of detention.

## APPENDIX

(Reproduced from pages 42 and 43 of the " Seventh Report on the Work of the Children's Department," published by Her Majesty's Stationery Office, 1955.)

" 195. The first detention centre was opened in August, 1952, at Campsfield House, Kidlington, near Oxford, for boys aged fourteen and under seventeen. It is available to courts in an area lying roughly between London, Bristol and Wolverhampton. This centre, a building of two storeys surrounded by open grounds within a high wire fence, provides suitable accommodation of medium security for some fifty-five boys. The keynote of the regime is brisk activity under strict discipline and supervision. Early morning physical training is followed by domestic duties for all, full-time education for those of compulsory school age, and work for those over school age. In the evenings, there are classes, physical training, gymnastic instruction and other activities, including games. Saturday afternoons are devoted to organised outdoor sport. Particular attention is given to the inculcation of standards of personal cleanliness obedience and good behaviour.

" 196. On admission to the centre each boy is allocated to an officer who is responsible for his welfare and for furnishing the warden with a monthly report on progress. A boy is able to earn up to 1s. 6d. a week. Punishments include forfeiture of earnings, extra fatigues, deprivation of privileges, removal to a detention room, and loss of part of, or all, the remission which may be earned up to one-sixth of the whole period of detention, if the period exceeds one month. Parents are encouraged to co-operate with the staff of the centre by visiting every four weeks.

" 197. On discharge from the centre, a boy has completed the treatment ordered by the court and is not subject to recall or to other disciplinary action; there is no statutory requirement for after care. But, where a boy is willing, it is the duty of the Board of Visitors, in consultation with the warden and the probation officer, to make such arrangements as are practicable, and, on the Board's request the probation officer has a statutory duty to advise, assist and befriend such a boy for a period up to six months from the date of discharge. Where a boy on discharge is still the subject of a probation order or is licensed or under supervision by virtue of an approved school order, a report is furnished for the information of the probation officer or the approved school managers.

" 198. Among some five hundred boys discharged from Campsfield between the time of its opening in August, 1952, and the end of 1954, about three hundred were the subject of another court order, for example, a probation order, that brought them under some form of supervision on leaving. Of the remaining two hundred only about twenty boys could be persuaded to accept supervision on a voluntary footing."

# Summary Justice

*Animals*

Horse. Being owner of a straying horse; fined 5s.; Vickers: Northfleet Magistrates' Court (*Evening Standard*, March 15).

Horses. Transporting horses in a vehicle not permitting inspection from outside and in which the horses were not separated from each other by a partition; fined £52 10s.; Crowther: Rochdale Magistrates' Court (*Manchester Guardian*, March 22).

*Armed forces*

Deserter. Family harbouring deserter and resisting attempts by police to arrest him; each member of the family fined £2; Johnson: West Bromwich Magistrates' Court (*Birmingham Mail*, March 22).

*Binding over*

Man forbidden to visit wife's home refusing to be bound over to keep the peace; sentenced to seven days' imprisonment; Scarff: Barnet Magistrates' Court (*The Times*, March 27).

School attendance. Boy, aged fifteen, making only forty-four school attendances out of a possible 100; kept at home when father was ill and mother went to work; father fined £1; Geddes: Kettering Magistrates' Court (*Northamptonshire Evening Telegraph*, February 29).

*Firearms, explosives and offensive weapons*

Firearms. Father lending a firearm and ammunition to his son, aged eleven, and aiding and abetting him to carry a gun; fined £1 on each charge; Jones: Fareham Magistrates' Court (*Evening Standard*, March 26).

### *Food and drugs*

Milk. Selling milk which contained added water to the prejudice of the Milk Marketing Board; fined £20 and ordered to pay £3 3s. costs; Walker: Liverpool Magistrates' Court (*Liverpool Echo*, March 21).

Milk. Being in possession of milk for sale to which water had been added; fined £20; Allanson: Otley Magistrates' Court (*Yorkshire Evening Post*, March 2).

### *Gas*

Gas Board supplying gas below correct pressure; fined £10, ordered to pay £7 7s. costs; North Eastern Gas Board: Bradford Magistrates' Court (*The Times*, March 7).

### *Highways*

Interrupting free passage of the highway; bus overtaking car when offside car door opened and scraped alongside the bus; car owner fined 10s., ordered to pay 17s. 6d. costs; Reynolds: Stockton Heath Magistrates' Court (*Liverpool Echo*, March 13).

### *Larceny, etc.*

False representation. Salesman representing himself as a soldier at the Portsmouth Salvation Army Hostel to get a cheap bed; fined £10; Welford: Portsmouth Magistrates' Court (*Evening Standard*, March 19).

Perjury. Forging parents' consent to marriage; fined £25; Maddock: Leicester Magistrates' Court (*Evening Standard*, March 19).

### *Master and servant*

Deduction from pay. Employers stopping 8s. from pay of man who left after dispute, alleging that he had failed to give two hours' notice required under agreement; fined £5 for contravening section 3 of the Truck Act, 1831; Arnold Sharrocks, Ltd.: Chester Castle Magistrates' Court (*Liverpool Echo*, March 28).

### *Official secrets*

Man possessing sketch used in prohibited place unlawfully communicating it to another and unlawfully retaining such a sketch in his possession; sentenced to three months' imprisonment on each charge, the sentences to run consecutively; Palmer: Bow Street Magistrates' Court (*The Times*, March 2).

### *Post Office*

Telephone. "Tapping out" telephone calls instead of paying for them; pleaded guilty to fraudulently using electricity; conditional discharge; Skinner: West London Magistrates' Court (*Evening Standard*, March 5).

Postwoman stealing letters containing bank notes; fined £50 with alternative of three months' imprisonment; Maund: Birmingham Magistrates' Court (*Birmingham Mail*, March 22).

### *Railways and ships*

Ships. Cargo vessel registered in Liberia found seven inches over-loaded in a Liverpool dock; master fined £800, ordered to pay £7 7s. costs; Pantelidis: Liverpool Magistrates' Court (*Liverpool Echo*, March 8).

Ships. Jamaican stowing away in a banana boat to Liverpool; sentenced to four weeks' imprisonment; Reid: Liverpool City Magistrates' Court (*Liverpool Echo*, March 6).

### *Road traffic*

Identity of driver. Owner of a motor-vehicle the driver of which was alleged to be guilty of an offence failing to give information to the police as to the identity of the driver; fined £2; Skeels: Boston Magistrates' Court (*Peterborough Citizen and Advertiser*, March 2).

Number plates. Driving car with the front number plate not easily distinguishable, the rear number plate not illuminated and without a rear light; fined £5; Ellis: Wakefield City Magistrates' Court (*Wakefield Express*, February 25).

Lorry driver smashing plate glass window; attempted to start lorry by pushing it down slope of car park, but it moved too fast and freewheeled into window of showroom; fined £5 for injuring property with the motor-lorry through his negligence; Shindler: Birmingham Magistrates' Court (*Birmingham Mail*, March 2).

Excess weight. Haulage contractor using motor-lorry with excess weight on the rear axle of nine tons and excess weight of fourteen tons on all wheels; said coal on his lorry was wet and much heavier than usual; fined £2; Newbould: West Riding Magistrates' Court (*Wakefield Express*, February 18).

Driving test. Woman attempting to bribe driving examiner to let her pass test and giving him 10s. so that he would not report the attempted bribery; fined £10; Barnsley: Birmingham Magistrates' Court (*Manchester Guardian*, March 15).

Driving test. Man offering money to examiner as an inducement to certify he had passed driving test; fined £5; Ratcliffe: Henley-on-Thames Magistrates' Court (*The Times*, March 16).

## Case and Comment

The reports of cases to which initials are appended hereunder have been specially prepared for *The Criminal Law Review* by the following reporters:—

HENRY PALMER, *Barrister-at-Law*.

J. D. PENNINGTON, *Barrister-at-Law*.

**Dangerous Drugs**—*Aiding and abetting unlawful possession—doctor supplying heroin to patient being treated by another*

R. *v*. ROURKE (Marylebone Magistrates' Court: G. G. Raphael, Esq., Metropolitan Magistrate) (20 *Journal of Criminal Law* 18).

The defendant was charged with aiding and abetting one W., who it was alleged had had unlawful possession of a drug. In 1954 M. began treating W. for heroin addiction and gave him prescriptions twice a week for 100 ¼-grain tablets of heroin, the minimum amount which he considered would maintain W.'s health. Unknown to M., the defendant, another doctor, who it was alleged knew or should have known that W. was being treated for addiction, began to supply W. with prescriptions for heroin, so that the latter obtained a dual supply. W. died through an overdose of heroin.

*Held*, the defendant was not guilty. There was nothing in the regulations limiting the quantity of drugs that might lawfully be prescribed by a doctor. The regulations should not be interpreted so that no offence would have been committed by W. and therefore by the defendant if W. had informed the defendant of his treatment by M., but was committed if W. did not so inform him and the defendant obtained the information through other sources.

**Evidence**—*Admissibility—written statement made by accused—admissibility in part*

R. *v*. PRAGNELL [1] (Winchester Assizes: Oliver J.: March 8, 1956).

The accused pleaded guilty to incest in respect of his sister J., but not guilty to an indecent assault upon his sister K. At the trial it was submitted by the defence that all evidence concerning J. was inadmissible because irrelevant and highly prejudicial, and accordingly a written statement made by the accused (after caution) which dealt with both charges ought to be wholly excluded since the bulk of it related to J., and it would be virtually impossible to separate what the accused had said about K. from what he had said about J.

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[1] For the prosecution: *Desmond Vowden* (instructed by the Director of Public Prosecutions). For the defendant: *Neil Butter* (instructed under Poor Persons Defence Act, 1930).

*Held*, that the statement was admissible but that all references in it to J. ought to be excluded even though such part of the statement as remained was difficult to understand.

Subsequently K. refused, in effect, to give evidence against the accused. The prosecution took the view that it would clearly be wrong to apply to treat her as a hostile witness since the case depended upon her evidence, there being in any event little corroboration.

*Held*, accepting this view, that K. should not be treated as hostile and the jury must accordingly acquit.

The accused was sentenced to Borstal training upon the charge to which he had pleaded guilty.

[Neil Butter, *Barrister-at-Law*.]

COMMENTARY. Where the prosecution put in a statement by the accused as a rule the whole of the statement should be put in evidence: *R.* v. *Jones* (1827) 2 C. & P. 629. But it has been held that where it contains an admission of guilt of an offence other than that which is the subject of the trial, that part of the statement will be excluded unless otherwise relevant: *R.* v. *Knight and Thompson* (1946) 31 Cr. App.R. 52.

**Evidence**—*Corroboration*. See R. *v.* TRAGEN, p. 332, below.

**Evidence**—*Judge's discretion to recall witness*

R. *v.* MCKENNA [2] (Court of Criminal Appeal: Lord Goddard C.J., Hilbery and Byrne JJ.: February 27, 1956).

M. was convicted at the Central Criminal Court of offences concerning the export of certain articles in contravention of article 2 of the Export of Goods (Control) (Consolidation) Order, 1952. The articles in question included steam-rollers, lorries, traction engines, a Scammell Prime Mover and concrete mixers. In order to be within the terms of the Order, the articles had to be " goods subjected to any process of manufacture, wholly or mainly of iron or steel," and not elsewhere specified in Schedule A of the Order. The articles in question were not specified elsewhere in the Schedule. At the close of the case for the prosecution, M. submitted that there was no case to answer on the ground that there was no evidence that any of the articles in question were made wholly or mainly of iron or steel. The learned commissioner thereupon recalled one of the prosecution witnesses in order to give evidence of the materials of which the articles were made; and he ruled that there was a case to go to the jury. M. appealed to the Court of Criminal Appeal on the main ground that the learned commissioner was not entitled to recall a prosecution witness after the close of the case for the prosecution.

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[2] For the appellant: *Leonard Caplan Q.C., D. P. F. Wheatley* (instructed by Percy Haseldine & Co.). For the Crown: *S. Alastair Morton* (instructed by the Solicitor, H.M. Customs & Excise).

*Held*, dismissing the appeal, that a judge in the circumstances in which the learned commissioner acted in this case, has complete discretion as to whether a witness shall be recalled, and the Court of Criminal Appeal would not interfere with the exercise of that discretion unless an injustice had resulted. It was clear that there was no injustice in this case. It was sufficient, in this connection, to refer to the case of *R.* v. *Sullivan* [1923] 1 K.B. 47. In any event, the court was satisfied that there would have been sufficient evidence to go to the jury without the evidence of the recalled witness. It was not a very great stretch of the imagination to think that steam-rollers and traction engines were made mainly of iron and steel.

*Per* Lord Goddard C.J.: There was another way of regarding this case. Prima facie evidence was given at the trial that the articles in question were wholly or mainly of iron or steel. If the contention of the defence was that these articles were not wholly or mainly of iron or steel, that was a matter peculiarly within the knowledge of the defence, and, in those circumstances, steps should have been taken to demonstrate the fact that the contention of the prosecution was wrong. No such evidence had been given and, in those circumstances, the court did not take the view that the prosecution had to prove in each instance that the articles in question were made wholly or mainly of iron or steel. [H. P.].

COMMENTARY. In *R.* v. *Sullivan* [1923] 1 K.B. 47, a case which concerned the validity of certain evidence allowed in rebuttal, it was held by the Court of Criminal Appeal that "a judge has in a criminal trial a discretionary power, with which a Court of Appeal cannot interfere, unless it appear that an injustice has thereby resulted, of recalling witnesses at any stage of the trial and of putting such questions to them as the exigencies of justice require." In *R.* v. *Remnant* (1807) R. & R.

136, the prisoner was accused of stealing some banknotes, the property of one J. N. At the close of the case for the prosecution the prisoner's counsel objected that there was no evidence that the notes were ever in the actual possession of J. N. and that they could not constructively be so at the time of the larceny committed. The judge wished to make further inquiries about the notes but on its being objected that counsel for the prosecution had closed his case he forbore to do so. The prisoner was convicted. On appeal it was held that it would have been competent and proper for the judge, if he had thought fit, to have made any further inquiry respecting the property after the close of the prosecution's case.

### **Evidence**—*Retraction of evidence by chief prosecution witness—effect on conviction*

R. *v*. McDade [3] (Court of Criminal Appeal: Lord Goddard C.J., Hilbery and Byrne JJ.: February 27, 1956).

M. was convicted at Lewes Assizes of incest and sentenced to four years' imprisonment. At the trial, the prosecution relied on the evidence of M.'s daughter and on evidence of a full confession of the offence made by M. to the police. After the trial the daughter wrote to her mother in the following terms: "Well Mum I am going to tell you the truth ; it is easier on paper than to your face. I did tell a lot of lies about Dad and I hope I can find the pluck to tell the truth in the future. I only said those things so as I could get my own back for being tied down." M. applied to the Court of Criminal Appeal for leave to appeal against his conviction on the ground that, as the chief prosecution witness now retracted her evidence, on the authority of *R*. v. *Hullett* (1922) 17 Cr.App.R. 8, the conviction ought not to stand.

*Held*, dismissing the application, that there was here abundant evidence on which the jury could convict M., namely his confession, without the evidence of the daughter. The case of *R*. v. *Hullett* was an entirely different one where, without the evidence of the girl, the jury might not have convicted. [H. P.].

Commentary. In *R*. v. *Hullett* the appellant was convicted at London Sessions of inflicting grievous bodily harm and sentence was postponed till the next sittings. In the meanwhile an important witness went to the police and explained that her statement at the trial was due to a mistake. As it could not be said that without her testimony the jury must have convicted, the conviction was quashed.

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[3] For the applicant: *R. F. S. Body* (instructed by Hurst & Hurst).

### **Falsification of Accounts by a Servant**—*Distinction between intent to deceive and intent to defraud*

R. *v.* FOWLER [4] (County of London Sessions: Henry Elam, Esq., Deputy Chairman: March 27, 1956).

The accused, the manager of a furniture shop, pleaded not guilty to six counts of falsification of accounts. He admitted that he had falsified the accounts and claimed that his intention was to conceal losses which had occurred from the till in order to avoid being prosecuted in respect thereof by his employer, who had threatened to prosecute him if any shortages were discovered. He denied that he intended to gain any pecuniary advantage. He stated in evidence that the shortages occurred weekly and in the course of ten months amounted to over £100. He concealed them first by paying his own money into the till, and later paid money received from customers, whose accounts he falsified. He had begun to repay his employer and intended to pay the whole of the money so taken. At the time of his arrest the deficiency was £81 0s. 6d. Cross-examined, he agreed that if he were prosecuted by his employer he would also be dismissed.

The deputy chairman referred the jury to the case of *R.* v. *Wines* [1954] Crim.L.R. 136, and directed the jury that it was necessary for the prosecution to prove that the accused had an intention not merely to deceive, but also to defraud his employer. If the accused intended to persuade his employer to take an action which he would not have taken had he known the truth, so that the accused was thereby achieving or avoiding something, there was sufficient intent to defraud.

The accused was found guilty.

[Peter G. Smith, *Barrister-at-Law*.]

COMMENTARY. The distinction between an intent to deceive, which is not criminal, and an intent to defraud was defined by Buckley J. in *Re London & Globe Finance Corporation* [1903] 1 Ch. 728, 733: "to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action." In *R.* v. *Wines* the appellant was held rightly convicted of falsification of accounts, where the intent was said to be to avoid dismissal by showing non-existent profits. The appellant thereby obtained wages which he would, apart from the falsification, not have received. It would appear that there may be an intent to defraud without any intent to derive pecuniary profit from the person defrauded. In *R.* v. *Bassey* (1931) 22 Cr.App.R. 160, where a student gained admission to an Inn of Court by producing forged documents it was held that there was evidence that the defendant intended to defraud, because he intended to induce the Benchers to act to their injury in admitting as a student a person whom, if they had known the true facts, it was their duty to exclude.

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[4] For the Crown: *S. H. Noakes* (instructed by the Solicitor for the Metropolitan Police). For the accused: *J. Yahuda* (instructed by Hanne & Co.).

**Habeas Corpus**—*Detention of person "found neglected"*

R. *v.* BOARD OF CONTROL, *ex p.* RUTTY [5] (Q.B. Divisional Court: Lord Goddard C.J., Hilbery and Devlin JJ.: March 9, 1956) ([1956] 2 W.L.R. 822; [1956] 1 All E.R. 769).

R., since the age of three months had been brought up in a poor law institution. She went to ordinary schools and after leaving school she was employed in the institution but did not give satisfaction. By June, 1948, she was seventeen years of age and there was no power to detain her in the institution, and, as it was feared that she was about to leave, she was removed to a mental institution under a "place of safety" order in accordance with section 15 (1) of the Mental Deficiency Act, 1913. In December, 1948, a petition was presented by the supervising officer of the county council to a magistrate acting as the judicial authority under the Mental Deficiency Acts, 1913 to 1927, asking for a reception order so that she could be detained in an institution for defectives. The magistrate found that R. was a defective and that she was subject to be dealt with under the Acts by reason of her being found neglected and made a reception order. After training she was given licence to live with her half-brother. R. applied for a writ of habeas corpus claiming that the reception order was *ultra vires* the Act of 1913.

*Held* (1) that although, on an application for habeas corpus, the court did not sit as a court of appeal to re-hear matters decided by the judicial authority, it would admit affidavit evidence to decide whether there was any evidence before that authority to justify the finding that the authority had jurisdiction to make the order. (2) That the words "found neglected" meant physically suffering from a lack of essentials through want of reasonable care and were only applicable to a condition in existence and not to a future condition which it was apprehended might come about. Accordingly, there was no evidence on which the magistrate could decide that R. was "found neglected" and, therefore, he had no power to make the reception order. [J. D. P.]

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[5] For the applicant: *J. F. F. Platts-Mills* (instructed by Robert K. George). For the half-brother: *Mrs. E. Underhill* (instructed by Robert K. George). For the Board of Control and the medical superintendent: *Rodger Winn* (instructed by Solicitor, Ministry of Health). For the judicial authority: *V. G. Hines* (instructed by W. J. Piper, Chelmsford).

COMMENTARY. The only reported authority on the meaning of "found neglected" in this subsection is *Re Wilkinson* (1919) 83 J.P. 422. In that case a reception order granted under section 2 (1) (*b*) was quashed where the alleged neglect of a mentally defective youth who lived in a comfortable home and who was properly cared for by his parents was that he was not being taught or specially trained as a mental defective should be.

**Incest**—*Evidence.* See R. *v.* MCDADE, p. 329, above.

**Indecent Assault**—*Evidence—corroboration*

R. *v.* TRAGEN [6] (Court of Criminal Appeal: Lord Goddard C.J., Hilbery and Byrne JJ.: March 12, 1956) (*The Times*, March 13, 1956).

T., a schoolmaster, was convicted at the Lancashire County Sessions of an indecent assault in the school premises on a girl aged eleven. At the trial T.'s defence was that he had patted or shoved the girl and had done nothing more. He appealed against his conviction on the ground that the learned deputy chairman had misdirected the jury in law with regard to corroboration. It was submitted that the learned deputy chairman had wrongly taken the view that T.'s admission as to "patting or shoving" amounted to corroboration of the girl's evidence, and had wrongly directed the jury in saying: "I direct you as a matter of law that . . . there is corroboration."

*Held*, allowing the appeal, that the function of the judge was to point out the evidence capable in law of being regarded as corroboration. It was then for the jury to decide whether or not this evidence amounted to corroboration. The jury were misdirected in this respect, and the conviction would, therefore, be quashed. [H. P.]

COMMENTARY. In cases of indecent assault "the proper direction . . . is that it is not safe to convict upon the uncorroborated testimony of the prosecutrix, but that the jury, if they are satisfied of the truth of her evidence, may, after paying attention to that warning, nevertheless convict": Lord Hewart C.J., *R.* v. *Jones* (1925) 19 Cr.App.R. 40. If a person charged with this offence admits certain acts of indecency there is no need to direct the jury on corroboration because what is required to be corroborated is the indecency: *R.* v. *Rolfe* (1952) 36 Cr.App.R. 4.

See Archbold, 33rd ed., 1104.

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[6] For the appellant: *Rose Heilbron Q.C.*, *J. Booth* (instructed by Rawsthorn Ambler & Brown, Preston). For the Crown: *David McNeill* (instructed by the Director of Public Prosecutions).

**Indictment**—*Joint indictment.* See R. *v.* MOORE, p. 345, below.

**Inland Revenue**—*False returns—common law offence*

R. *v.* HUDSON [7] (Court of Criminal Appeal: Lord Goddard C.J., Hilbery and Byrne JJ.: March 19, 1956) ([1956] 2 W.L.R. 914; [1956] 1 All E.R. 814).

H. was convicted at Nottingham Assizes upon a number of counts of an indictment charging him with causing to be delivered to an Inspector of Taxes certain accounts relating to his business which accounts falsely stated that the profits of the business were less than they in fact were; and he was also convicted of fraudulently delivering a false certificate of disclosure (*i.e.*, a statement that he had made a full disclosure of all facts bearing on his liability to income tax) to an Inspector of Taxes. H. was fined £2,600. He appealed to the Court of Criminal Appeal against his conviction on the ground that the offences were unknown to the law.

*Held,* dismissing the appeal, that these offences were not dealt with specifically in the Income Tax Acts or the Perjury Act, 1911, and, although indictments in this form had been used by the Inland Revenue for more than thirty-five years, they had never before been challenged in this court. However, the case of *The King* v. "*J.*" [1933] N.I. 73, decided that they were common law offences in Northern Ireland. Further, Hawkins' *Pleas of the Crown* laid it down that "all frauds affecting the Crown and public at large are indictable as cheats at common law," and East's *Pleas of the Crown* stated that "all frauds affecting the Crown and the public at large are indictable, though arising out of a public transaction or contract with a party." In addition Lord Mansfield in 1783 giving judgment in the case of *Bembridge* said in the clearest possible terms that a fraud on the public by an individual is indictable, although the particular fraud might not have been indictable if it had been a fraud by one subject upon another. The same objection as in the present case was taken before Bray J. at Hampshire Assizes thirty-five years ago in *R.* v. *Bradbury & Edlin,* unreported, and the indictment was upheld. The offence in the present case was that of sending documents to the Inland Revenue which were false and fraudulent to H.'s knowledge, and it was a common law offence. The court reaffirmed the law as stated by Hawkins, by East, by Lord Mansfield and by Bray J., and the appeal would, therefore, be dismissed. [H. P.]

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[7] For the appellant: *N. E. Mustoe Q.C., Victor Durand* (instructed by Jaques & Co. for Ollard, Ollard & Sessions, Wisbech). For the Crown: *Sir Reginald Manningham-Buller A.-G., Q.C., Richard Elwes Q.C., J. A. Grieves* (instructed by the Solicitor, Inland Revenue).

COMMENTARY. This decision affirms a generally accepted view of the law. Revenue frauds and the common law were considered in an article by "Clericus" at [1954] Crim.L.R. 354, in which he examined the cases here cited. In *R.* v. *Bradbury* Bray J. rejected an argument that section 178 of the Income Tax Act, 1842 (see now s. 48 (1) of the Act of 1952), which provided a monetary penalty for false or fraudulent statements whereby income tax was avoided, superseded the common law.

For specimen form of indictment see Archbold, 33rd ed., 1299.

### **Magistrates' Courts**—*Notice of adjourned hearing—notice sent by registered post returned undelivered*

R. *v.* LONDON QUARTER SESSIONS APPEALS COMMITTEE, *ex p.* ROSSI [8] (Court of Appeal: Denning, Morris and Parker L.JJ.: February 26, 1956) ([1956] 2 W.L.R. 800; [1956] 1 All E.R. 670).

Pursuant to section 3 (1) of the Summary Jurisdiction (Appeals) Act, 1933, the clerk of the peace to a quarter sessions appeals committee gave notice of the date, time and place fixed for the hearing of an appeal by the mother of an illegitimate child from the dismissal of her summons against R., who she alleged to be the father. R. attended on the date stated, but the case was adjourned *sine die.* Later the clerk sent a notice by registered post to R. at his usual address stating the date fixed for the adjourned hearing, but the letter was returned marked "Undelivered. No response." R. did not appear at the adjourned hearing and the court heard the appeal in his absence and made an order against him. On an application for an order of certiorari to quash the proceedings:—

*Held,* that the word "hearing" in section 3 (1) included "hearings" and the clerk was correct in sending the notice of the adjourned hearing to R.; but, it was not sufficient, to comply with section 3 (1), to send the notice to R. when it was proved not to have been received by him, and, therefore, once it appeared that the registered letter was returned undelivered, quarter sessions ought not to have proceeded with the case, because there was no proper service. The order was obtained irregularly and certiorari should issue to quash the proceedings.

*Per curiam*: If the order had been regularly obtained then there would be no ground for certiorari, and R.'s only remedy would be by application to quarter sessions to set aside the order made in his absence and to rehear the appeal. [J. D. P.]

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[8] For the applicant: *J. E. S. Simon Q.C., Neville Vincent* (instructed by Good, Good & Co.). For the mother: *Michael Pearson* (instructed by S. Dalton). The justices were not represented.

COMMENTARY. Section 3 (1) of the Summary Jurisdiction (Appeals) Act, 1933, applies to appeals in criminal cases. By section 26 of the Interpretation Act, 1889, service of a document authorised to be sent by post is " deemed to be effected by properly addressing, prepaying, and posting a letter containing the document, and unless the contrary is proved to have been effected at the time at which the letter would be delivered in the ordinary course of post."

Quarter sessions may set aside a judgment or order made in the absence of a party: *St. Andrews Inhabitants, Holborn* v. *St. Clement Danes* (1704) 2 Salk. 606.

**Murder**—*Insanity—direction to jury*

R. *v.* EDMUNDS [9] (Court of Criminal Appeal: Lord Goddard C.J., Hilbery and Byrne JJ.: March 12, 1956) (*The Times*, March 13, 1956).

E. was convicted at Monmouthshire Assizes of the murder of an old woman and sentenced to death. It was conceded at the trial that the death was caused by E., and the defence was that E. did not know what he was doing because he was suffering from a disease of the mind. E. appealed to the Court of Criminal Appeal on the ground that there was evidence upon which a verdict of insanity ought to be substituted. It was submitted that the trial judge had failed adequately to direct the jury upon the distinction between the burden of proof as it rested upon the prosecution and the burden of proof as it rested on the defence.

*Held*, dismissing the appeal, that the judge had left the issue fairly to the jury, and told them that the issue was whether or not they found E. so insane as to relieve him of his responsibility for his acts. It was not enough that he should have had some form of insanity—it must be such as relieved him from responsibility; *McNaghten's Case* was still the law. The judge put that to the jury and told them that the same standard of proof was not required where the burden of proof was on the defence as when it was on the prosecution, and that they were entitled to find insanity if they thought that on all the probabilities he was insane, though they were not certain. The jury did not find insanity, and the Court of Criminal Appeal would not, in the present case, substitute a verdict of insanity. The evidence that E. was not so insane as not to be responsible for his act was overwhelming; the medical evidence showed that E. was sane, and the appeal would, therefore, be dismissed. [H. P.]

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[9] For the appellant: *M. A. B. King-Hamilton Q.C., Arthur Davies* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *J. F. Bourke* (instructed by the Director of Public Prosecutions).

COMMENTARY. Insanity, if relied upon as a defence, must be established by the defendant (*R.* v. *Smith* (1910) 6 Cr.App.R. 19), but the burden of proof is not greater than that resting upon a party to civil proceedings, *i.e.*, insanity may be proved by a preponderance of evidence and need not be proved beyond reasonable doubt: *Sodeman* v. *R.* [1936] 2 All E.R. 1138.

See Archbold, 33rd ed., 16, 20.

**Police**—*Police answering 999 call—intervention to stop noise—whether in execution of their duty*

HOLLANDS *v.* ABEL [10] (Q.B. Divisional Court: Lord Goddard C.J., Stable and Ashworth JJ.: January 11, 1956).

Two police officers received a 999 call relayed from Scotland Yard from a householder who occupied a flat above that occupied by the defendant. The police officers investigated the call and the householder complained to them of noise coming from the flat of the defendant who was entertaining friends. The defendant's flat had a separate entrance at the back of the house and the police officers went round to the back, knocked on the door and asked for quiet. The defendant came out of his door and, going not to the officer who had asked for quiet but to the other, who was standing behind, knocked him down and tried to run him out of the garden saying "I'll bury you in the garden." The defendant was convicted of assault by Greenwich justices and the conviction was upheld by quarter sessions. On appeal by way of case stated by the appeal committee it was contended for the defendant that since the police officers had already investigated the cause of the 999 call they were no longer on duty when they went to the door of the defendant's flat but were merely intervening on behalf of a private citizen and that, therefore, as the defendant had requested them to go away they were trespassers whom he was entitled to use reasonable force to eject.

*Held*, dismissing the appeal, that the police officers were on duty and remained on duty until they went off duty at the end of their patrol, and that, as they had not unlawfully entered the defendant's premises it was impossible to say that the police officer had not been assaulted in the execution of his duty. There could not be a more hopeless or groundless appeal and it was to be regretted that quarter sessions had stated a case.

[Miss J. F. Lamb, *Barrister-at-Law*.]

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[10] For the defendant: *J. Macaskie* (instructed by Prothero & Prothero).
For the prosecutor: *Victor Durand* (instructed by the Solicitor, Metropolitan Police).

COMMENTARY. It is an offence under the Offences against the Person Act, 1861, s. 38, to assault a policeman acting in the due execution of his duty. It cannot be assumed that because a police officer is on patrol he is necessarily acting in the due execution of his duty. In *Davis* v. *Lisle* [1936] 2 K.B. 434, a police officer on duty, believing that an offence had been committed by the appellant's servants causing an obstruction in the highway with a motor lorry, followed the lorry into the appellant's garage to make inquiries. The appellant asked the police officer to leave the premises and on the latter's refusal assaulted him. It was held that the police officer became a trespasser when the appellant told him to leave and therefore the appellant could not be convicted of assaulting him in the execution of his duty. Although an act might not fall within the section it might still constitute common assault: *R.* v. *Mabel* (1840) 9 C. & P. 474. At common law the duties of a policeman include the prevention of a breach of the peace, which has been defined as " any violation of that quiet, peace and security which is guaranteed by the laws for the personal comfort of every individual." It could be argued that the officers in the present case were acting in the execution of that duty.

See Archbold, 33rd ed., 1037, 1039.

### **Prison**—*Assisting prisoner to escape—prisoner working outside prison—lawful custody*

R. *v.* ABBOTT [11] (Court of Criminal Appeal: Lord Goddard C.J., Hilbery and Byrne JJ.: March 26, 1956) (*The Times*, March 27, 1956).

A. was convicted together with another man of assisting a prisoner, one B., to escape from Dartmoor prison contrary to section 39 of the Prison Act, 1952, and also of conspiracy to effect the escape of B. A. was sentenced to two years' imprisonment for each offence, the sentences to run concurrently. At the time of the offence, A was a prison officer at Dartmoor and B. was a prisoner. A. appealed to the Court of Criminal Appeal against his conviction on the grounds, first, that there was no evidence given at the trial that at the time of the escape B. was a prisoner in lawful custody, and secondly, that at the moment of the escape B. was doing work outside the prison and was, therefore, not escaping " from prison."

*Held*, dismissing the appeal, that the prosecution ought to have produced B.'s conviction at the trial; but in fact there was evidence that B. was in lawful custody because B. himself gave evidence that he was a prisoner. The verdict having been given, no objection could be made, because the verdict cured the defect. As regards the second ground of appeal, it would be very unfortunate if the court had to hold that prisoners outside the prison were not in lawful custody, because then prisoners would not be taken outside prison. The court were of opinion that if a prisoner escaped when outside the prison building on a routine working party, he was escaping from prison. That seemed to be clear from several sections of the Prison Act, 1952. The appeal would, therefore, be dismissed. [H. P.]

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[11] For the appellant: *T. Dewar* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *Malcolm Wright Q.C., Mervyn Heald* (instructed by the Director of Public Prosecutions).

COMMENTARY. This appeal was based on purely technical grounds which in the circumstances did not give rise to any possibility of injustice. Section 13 (2) of the Prison Act, 1952, expressly provides that "a prisoner shall be deemed to be in legal custody . . . while he is working, or is for any other reason, outside the prison in the custody or under the control of an officer of the prison."

See Archbold, 33rd ed., 1257, 1261.

**Prostitution**—*Living on the earnings of prostitution—flats let at higher rent*

R. *v.* SILVER [12] (Central Criminal Court: Judge Maude Q.C.: February 9, 1956) ([1956] 1 W.L.R. 281; [1956] 1 All E.R. 716).

S. and seven other men were charged on indictment under s. 1 (1) of the Vagrancy Act, 1898, with living wholly or in part on the earnings of prostitution. It was alleged that four of the accused were landlords of flats in Soho which would normally be let at rents of £3 to £5 a week, but which were let to individual prostitutes at rents as high as £25 a week. In addition the women had to pay £200 key money. The other accused ran an estate agency which, it was alleged, was almost wholly concerned with providing and letting flats to prostitutes. There was no evidence that any of the accused were living with or habitually in the company of any of the prostitutes or had exercised control, direction or influence over their movements.

*Held*, that, on the facts, no offence under section 1 (1) of the Act of 1898 had been disclosed. [J. D. P.]

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[12] For the Crown: *Mervyn Griffith-Jones, Alastair Morton* (instructed by Director of Public Prosecutions). For the accused: *Jeremy Hutchinson, Victor Durand, John Abrahams, R. E. Seaton, Tudor Price, Reginald Hollis* and *Brian Leary* (instructed by William Foux & Co., Alfred Kerstein & Co., Tarlo, Lyons & Co., and Clerk of the Central Criminal Court).

COMMENTARY. Apart from one unreported case, *R.* v. *Gorman* (1954) it seems that no other attempt has been made to invoke section 1 (1) of the Vagrancy Act, 1898, in this way.

See also [1956] Crim.L.R. 217; Archbold, 33rd ed., 1112.

### **Road Traffic**—*Disqualification—removal with regard to particular class of vehicle*

R. *v.* COTTRELL [13] (Court of Criminal Appeal: Lord Goddard C.J., Hilbery and Byrne JJ.: March 12, 1956) ([1956] 1 W.L.R. 342; [1956] 1 All E.R. 751).

C. pleaded guilty to dangerous driving at Swansea Assizes on July 12, 1954, and was fined £50 and disqualified from driving for five years. After imposing the sentence, the learned judge, Glyn-Jones J., told C. that, if he applied after the expiration of twelve months to have the disqualification removed as far as motor-cycles were concerned, he thought that it would be a proper case for indulgence to be shown. After eighteen months C. applied to have the disqualification varied, and McNair J. held that he had no power to do so ([1956] Crim.L.R. 127). C. applied to the Court of Criminal Appeal for leave to appeal out of time against the original sentence imposed on him in July, 1954.

*Held,* that McNair J. was right in holding that he had no power to vary a disqualification by virtue of section 7 (3) of the Road Traffic Act, 1930. Glyn-Jones J. clearly did not intend the disqualification for driving a motor-cycle to remain in force for the full five years, and thought that C. would be able to get the disqualification varied after a year. The learned judge was there in error. C. had been led to believe that he would get permision to ride his motor-cycle, and it would be very bad luck on him if he had to suffer a more serious punishment than the judge intended. Accordingly, the time for appeal would be extended and the application for leave to appeal granted. The hearing of the application would be treated as the hearing of the appeal and, in the circumstances, the sentence would be varied by limiting the class of vehicles which C. was disqualified from driving to motor-lorries only. [H. P.]

COMMENTARY. There is no provision in the Road Traffic Bill, now being considered in committee in the House of Commons, empowering a court to vary a disqualification from driving. There are special circumstances in the present case in that the Court of Criminal Appeal was anxious that the appellant should not suffer because of the misapprehension of Glyn-Jones J.

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[13] The applicant did not appear and was not represented. The Crown was not represented.

**Road Traffic**—*Disqualification—second application for removal after first application granted for future date*

R. *v.* MANCHESTER JUSTICES, *ex p.* GAYNOR [14] (Q.B., Divisional Court: Hallett, Pearce and Pearson JJ.: November 28, 1955) ([1956] 1 W.L.R. 280; [1956] 1 All E.R. 610).

On April 27, 1954, G. was convicted of driving to the danger of the public contrary to section 11 (1) of the Road Traffic Act, 1930, and was fined £20 and disqualified from driving motor-vehicles for three years from the date of conviction. On May 27, 1955, G. applied under section 7 (3) of the Act for the removal of the disqualification and the justices ordered its removal as from April 27, 1956. On August 31, 1955, G. applied for the immediate removal of the disqualification on the ground of hardship. The justices refused to allow the application to be made on the ground that they had no jurisdiction to hear it, since the previous application had been granted and further applications could only be made if a previous application had been refused. On a motion for an order of mandamus requiring the justices to consider the application:—

*Held*, that the justices had jurisdiction to hear the second application. [J. D. P.]

COMMENTARY. This is a straightforward interpretation of section 7 (3) of the Road Traffic Act, 1930, which provides that: "A person who . . . is disqualified for holding or obtaining a licence, may, at any time after the expiration of six months . . . and from time to time apply to the court . . . to remove the disqualification, and . . . the court may . . . either by order remove the disqualification as from such date as may be specified in the order or refuse the application."

**Road Traffic**—*Driving while under the influence of drink—starting a car*

R. *v.* LEVY (North London Magistrates' Court: Seymour Collins, Esq., Metropolitan Magistrate) (20 *Journal of Criminal Law* 5).

The defendant was charged with driving while under the influence of drink. After spending the evening at a club with him, one of the defendant's friends drove him home. When they arrived at the defendant's house the owner of the car got out to speak to the defendant's wife, leaving the car in gear. The defendant remained in the car talking to another person and when he saw the owner returning he turned the ignition key and pulled the starter. The car moved forward and ran into a vehicle parked a few yards away. The defendant claimed that he only meant to start the car and his counsel submitted that the defendant was not driving; he could not drive, he had no driving licence, and he was not trying to drive. The case should be distinguished from those where the driving was voluntary as in *Shimmell* v. *Fisher* [1951] 2 All E.R. 672, and *R.* v. *Kitson* [1955] Crim.L.R. 436.

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[14] For the applicant: *F. P. Neill* (instructed by Gregory, Rowcliffe & Co. for Pattinson, Harrison & Milne, Macclesfield). The justices were not represented.

*Held,* the defendant was guilty of driving under the influence of drink. A man must be presumed to intend the natural consequences of his acts and the defendant had deliberately done something causing the car to move. He was fined £10, ordered to pay £10 costs and disqualified from driving for twelve months.

COMMENTARY. In *Shimmell* v. *Fisher* the defendants, without the consent of the owner or other lawful authority, released the handbrake of a stationary vehicle and while one steered it, the other two pushed it a few yards. It was held that "driving" within the meaning of section 28 (1) of the Road Traffic Act, 1930, meant causing the vehicle to move from the place where it was standing. In *R.* v. *Kitson* the accused was convicted of driving under the influence of drink. He said that he had been dozing while his brother-in-law drove, suddenly awoke and found the car was moving and that no one was in the driving seat. The accused steered the car on to a grass verge. It was held that it was impossible to say that K. was not driving the car since it was subject to his control and direction.

See Archbold, 33rd ed., 1024.

### **Road Traffic**—*Leaving vehicle unattended without stopping engine and setting brake—information*

BUTTERWORTH *v.* SHORTHOSE [15] (Q.B. Divisional Court: Lord Goddard C.J., Stable and Ashworth JJ.: January 17, 1956).

The appellant was charged on an information alleging that he left a motor vehicle unattended without having stopped the engine and set the brake so as effectually to prevent at least two of the wheels revolving, contrary to Regs. 91 and 104 of the Motor Vehicles (Construction and Use) Regulations, 1955. The magistrates found that the appellant had stopped the engine but that he had not set the hand-brake properly. The appellant contended that reg. 91 created two offences and that the information was bad for duplicity or alternatively that on the wording of the information the respondent had to prove that the appellant had failed both to set the brake and to stop the engine. The respondent contended that reg. 91 only created one offence. The magistrates convicted the appellant. The same argument was put to the Divisional Court on behalf of the appellant, but the respondent was not called upon.

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[15] For the appellant: *D. M. Cowley* (instructed by Huntsman, Donaldson & Tyzack, Nottingham). For the respondent: *H. G. Talbot* (instructed by D. G. Gilman, Clerk of the Derbyshire County Council).

*Held*, the appeal should be dismissed.

[Miss Jean Fisher, *Barrister-at-Law*.]

COMMENTARY. Regulation 91 provides: "No person shall cause or permit to be on a road any motor vehicle which is not attended by a person duly licensed to drive it unless the engine is stopped and, where the vehicle is fitted with a brake capable of being set, the brake is set so as effectually to prevent two at least or in the case of a vehicle with only three wheels one of the wheels, from revolving." There is no direct authority on this point, but the proper interpretation of the regulation would seem to be that the regulation creates one offence which is committed by a failure to do either or both the required acts. Therefore, on an information such as the present, it is sufficient to prove failure to set the handbrake.

Magistrates may not try an information which charges more than one offence: Magistrates' Courts Rules, 1952, r. 14 (1). See Paley on *Summary Convictions*, 10th ed., 41, 280.

### **Road Traffic**—*Notice of intended prosecution—notice sent to owner of vehicle*

TAYLOR *v.* CAMPBELL[16] (Q.B. Divisional Court: Lord Goddard C.J., Hilbery and Stable JJ.: January 31, 1956).

C. was charged with dangerous driving. At the hearing of the information C.'s solicitor took the preliminary point that section 21 of the Road Traffic Act, 1930, had not been complied with. The magistrates found that C. was not warned at the time of the alleged offence that a prosecution was contemplated and was not summoned until about six weeks after. However, a notice of intended prosecution under section 21 was sent within fourteen days to British Road Services, Fife Group, the registered owners of the vehicle. The notice addressed to B.R.S. was typed on a printed form appropriate for service on an intended defendant, but was not adapted for use where it was sent to the registered owner, and stated: "You are hereby warned that you have been reported for an offence under the Road Traffic Act, 1930, and that it is intended to take proceedings against you . . ." followed by the necessary particulars in accordance with section 21. The magistrates were of the opinion that since it was never intended to prosecute B.R.S. but to prosecute the driver, it was not a notice of intended prosecution under section 21.

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[16] For the appellant: *Geoffrey Lane* (instructed by Cunliffe & Airy for Henry Thompson & Sons, Grantham). For the respondent: *Dennis Barker* (instructed by Huntsman, Donaldson & Tyzack, Nottingham).

*Held*, allowing the prosecutor's appeal, that if one did not know the driver of a vehicle, one served the notice on the registered owner, who for the purpose of receiving the notice was regarded as the driver and was meant to warn the driver. The fact that the word "you" occurred in the notice did not matter. The notice meant that a prosecution would take place. The case was to go back to the justices with a direction that the notice was good and the hearing of the charge should continue.

[Miss C. J. Ellis, *Barrister-at-Law*.]

COMMENTARY. Where a notice of intended prosecution is served under section 21 (*c*) on the registered owner of a vehicle, it is not necessary to state in the notice the name or address of the person whom it is intended to prosecute: *R.* v. *Bolkis* (1932) 24 Cr.App.R. 19. In *Pope* v. *Clark* [1953] 1 W.L.R. 1060, 1062, Lord Goddard C.J. said for a second time that "a modicum of common sense" should be used in considering the validity of notices under section 21, whose object is to call the proposed defendant's attention to the fact that he is going to be prosecuted while the facts are still in his mind.

### **Sentence**—*Preventive detention—substitution of term of imprisonment*

R. *v*. HORN [17] (Court of Criminal Appeal: Lord Goddard C.J., Hilbery and Byrne JJ.: March 5, 1956).

H. was convicted at Birmingham Assizes of breaking and entering and of being in possession of gelignite for the purposes of safe-breaking. H. was sentenced to fourteen years' preventive detention. The facts, shortly, were that a shop was broken into and a hole blown in the outer casing of the safe therein. Later various articles, including a detonator, were found on H.'s person, and gelignite was found in a suitcase at his house. H. was forty-seven years of age and had four previous convictions, including house-breaking and larceny, robbery with violence, assault on police and being in possession of an explosive substance. His last conviction was in 1945 when he was sentenced to three years' imprisonment. He appealed to the Court of Criminal Appeal against his sentence.

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[17] For the appellant: *R. N. Titheridge* (instructed by the Registrar, Court of Criminal Appeal). The Crown was not represented.

*Held*, that the court would take into account the fact that H. had not been in trouble since coming out of prison in 1948 and would vary the sentence to one of ten years' imprisonment. [H. P.]

COMMENTARY. Fourteen years is the maximum sentence of preventive detention which may be imposed. The Court of Criminal Appeal discourages sentences of preventive detention where sentences of imprisonment are appropriate, for instance, where the sole purpose of such a sentence is to protect the public for a certain length of time and this may be effected by imprisonment: see *R.* v. *Walls* [1956] Crim. L.R. 209. The maximum sentence for the offences of which H. was convicted is in both cases fourteen years' imprisonment.

### **Shops**—*Service on a Sunday—sale of raw kipper*

LONDON COUNTY COUNCIL *v.* COHEN'S (SMOKED SALMON) (North London Magistrates' Court: Frank Milton, Esq., Metropolitan Magistrate: November 7, 1955) (20 *Journal of Criminal Law* 24).

The defendants were charged with selling raw kippers in their shop on a Sunday contrary to section 47 of the Shops Act, 1950. Counsel for the defence contended that the sale was of a "meal or refreshment" within Schedule 5 of the Act; if, as was alleged, an article sold as a meal or refreshment should be edible in the state in which it was sold, then he asked that the summons should be dismissed, because kippers could be eaten in a raw state.

*Held*, following *Binns* v. *Wardale* [1946] K.B. 451, the kipper was a "meal or refreshment." The summons was dismissed and the defendants awarded £5 5s. costs.

COMMENTARY. Under Schedule 5 of the Shops Act, 1950, meals and refreshments may be sold on a Sunday whether or not for consumption at the shop at which they are sold. In *Binns* v. *Wardale* it was held that a loaf of bread is a "refreshment" within the meaning of the Act, and Lord Goddard C.J. said *obiter* that the sale of cooked meat might be the sale of either a meal or a refreshment. If carried to its logical conclusion it would seem that the sale of most food would fall within the definition of a sale of a meal or refreshment.

**Trial**—*Joint indictment—plea of guilty before trial by co-defendant —evidence*

R. *v.* MOORE [18] (Court of Criminal Appeal: Lord Goddard C.J., Hilbery and Byrne JJ.: March 12, 1956) (*The Times*, March 13, 1956).

M. was convicted at Northampton County Sessions of housebreaking and larcency and was sentenced to four years' imprisonment. M. had been indicted with another man who, before the trial, pleaded guilty. The premises concerned were a public-house, which had been broken into sometime after 2 a.m. The prosecution at the trial led evidence that M. was in the public-house with the other man that night, and that the next morning M. was at a 'bus stop about a mile away. M. was taken to the public-house by the police and he told them that he had never been in it in his life before. The case for the prosecution was, shortly, that M. had told a lie about being in the public-house, and because M. had been in the public-house together with the man who had pleaded guilty, that was evidence upon which the jury might convict. M. now appealed to the Court of Criminal Appeal against his conviction on the ground that there was no evidence to go to the jury.

*Held*, allowing the appeal, that where two men were indicted together and one pleads guilty, it was very difficult to avoid telling the jury and it was the commonest thing for them to be told not to pay any attention to it. The fact that one man had pleaded guilty was not evidence against his co-prisoner. What was said in the present case was that M. was in the company of the man who had pleaded guilty, and that was evidence upon which M. might be found guilty. The case ought to have been withdrawn from the jury at the close of the prosecution's case. It was not enough that there was a good deal of suspicion; and the conviction would, therefore, be quashed. [H. P.]

COMMENTARY. Upon an indictment charging two persons jointly with an offence either may be found guilty. Where defendants are charged on a joint indictment the prosecution should not call as witnesses defendants who are themselves concerned in the charge on which they are called: *R.* v. *Grant* (1944) 30 Cr.App.R. 99, followed in *R.* v. *Sharrock* (1947) 32 Cr.App.R. 124. A prisoner can only be affected by his own confessions and not those of others: see Phipson on *Evidence*, 9th ed., 272. Where two persons were indicted together, one for stealing and the other for receiving, and the principal pleaded guilty and the receiver not guilty, the judge refused to allow the plea of guilty to establish the fact of the stealing by the principal as against the receiver: see *R.* v. *Turner* (1832) 1 Mood. 347.

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[18] For the appellant: *Jane A. Russell Cargill* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *T. R. Fitzwalter Butler* (instructed by Phipps & Troup, Northampton).

### **Trial**—*Summing-up—case not properly put to the jury*

R. *v.* BRIDGLAND [19] (Court of Criminal Appeal: Lord Goddard C.J., Hilbery and Byrne JJ.: March 12, 1956) (*The Times*, March 13, 1956).

B. was convicted at the Central Criminal Court of conspiring with another man fraudulently to dispose of a stolen motor-car and of receiving the motor-car knowing it to have been stolen, and was sentenced to fifteen months' imprisonment. He appealed to the Court of Criminal Appeal against his conviction on the main ground that the summing-up was so lacking in clarity as to amount to a misdirection or a non-direction.

*Held*, allowing the appeal, that B.'s case had never been put properly to the jury. Anyone reading the summing-up would be no wiser at the end than he was at the beginning. There was no charge to the jury, and a mass of irrelevant matters, and some very unfortunate ones, were introduced. The summing-up could not properly stand, and the conviction would, therefore, be quashed. [H. P.]

COMMENTARY This case followed *R.* v. *Breed* (1931) 22 Cr.App.R. 166, in which it was held that an inadequate summing-up may be a ground for quashing a conviction. There Macnaghten J. explained the essentials of a summing-up when he said that a chairman of sessions had failed "to explain clearly to the jury what was the charge, what was the evidence in support of it, and what was the answer made by the defendant."

See Archbold, 33rd ed., 198, 344.

**Witness**—*Judge's discretion to recall.* See R. *v.* McKENNA, p. 327, above.

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[19] For the appellant: *G. D. Roberts Q.C., R. Castle-Miller* (instructed by Lynch, Hall & Son). For the Crown: *J. B. Hazan* (instructed by the Solicitor, Metropolitan Police).

# *Acts and Orders*

## Agriculture

AGRICULTURE (POISONOUS SUBSTANCES) (ORGANO-MERCURY COMPOUNDS) ORDER, 1956 (S.I. No. 376): operative March 22, 1956. The Agriculture (Poisonous Substances) Act, 1952, applies to organo-mercury compounds.

For offences and their penalties, see section 4 of the Act.

WART DISEASE OF POTATOES (PROTECTED AREA) (GENERAL LICENCE) ORDER, 1956 (S.I. No. 66): operative January 26, 1956. Between January 26, 1956, and January 1, 1957, seed potatoes obtained from crops grown in a protected area which are not themselves the subject of a prescribed certificate, but were grown in those areas in the previous year from certified stocks, may be planted or sold for planting within that protected area. No such potatoes may be planted in land on which wart disease has occurred at any time unless they are of an approved immune variety.

See MILK (SPECIAL DESIGNATIONS) (SPECIFIED AREAS) ORDER, p. 351, below.

## Aliens

ALIENS (APPROVED PORTS) ORDER, 1956 (S.I. No. 330): operative March 7, 1956. Gatwick is no longer an approved port for the purposes of the Aliens Order, 1953 (S.I. No. 1671; [1954] Crim. L.R. 68).

## Approved Schools

See CHILDREN AND YOUNG PERSONS ACT, p. 348, below; APPROVED SCHOOLS (CONTRIBUTIONS BY EDUCATION AUTHORITIES) (SCOTLAND) REGULATIONS, p. 356, below.

## Armed Forces

RULES OF PROCEDURE, 1956, ARMY (S.I. No. 162); AIR FORCE (S.I. No. 163): both operative January 1, 1957. These rules made under the Army and Air Force Acts of 1955 replace with amendment the Rules of 1947 (S.R. & O. No. 2354) and 1933 (S.R. & O. No. 250). They concern the investigation and trial of, and awarding of punishment for, offences cognisable by courts-martial, commanding officers and other military or air-force authorities, and the confirmation and revision of findings and sentences of courts-martial. The principal changes are (1) the period of time during which a person may be held in arrest before trial without the approval of a convening officer is reduced from ninety to seventy-two days (r. 6); (2) the procedure with regard to closing addresses is brought more in line with civil procedure (r. 62); (3) provision is made for occasions on which the accused requests other offences to be taken into consideration (rr. 72, 74 (3)); (4) rule 81 makes provision for a judge advocate to sit alone in accordance with section 104 of the Army Act, 1955, and section 104 of the Air Force Act, 1955; (5) provision is made for withdrawal of charges and charge-sheets (r. 82); (6) a court-martial at which there is a judge advocate may amend charges (r. 83 (2)); (7) the procedure is prescribed where an accused wishes to petition both before and after confirmation (r. 101).

### Birds

See WILD BIRDS ORDERS, p. 357, below.

### British Commonwealth

LEEWARD ISLANDS ACT, 1956 (4 & 5 Eliz. 2, c. 23): operative on a day to be appointed. Each of the four Presidencies which by virtue of the Leeward Islands Act, 1871, together constitute the colony of the Leeward Islands, that is to say Antigua, Saint Christopher Nevis and Anguilla, Montserrat and the Virgin Islands, is to become a separate colony. Courts may be constituted for these colonies by Order in Council, having such jurisdiction as may be determined by the Order, and emergency laws may be made for the new colonies. As from the day on which the Act becomes operative, the colonies to which the Leeward Islands and Windward Islands (Courts) Order in Council, 1939 (S.R. & O. No. 1898), applies will include the colonies constituted under the Act.

### Children and Young Persons

CHILDREN AND YOUNG PERSONS ACT, 1956 (4 & 5 Eliz. 2, c. 24): operative October 1, 1956. The provisions of the Children and Young Persons Act, 1933, and the Children and Young Persons (Scotland) Act, 1937, with respect to escapes from the care of fit persons, from approved schools, remand homes or special reception centres, are extended. The principal change is that powers under these Acts are made exercisable in any part of Great Britain, and whether the child or young person concerned was committed under the English or Scottish Act.

*Escapes from the care of fit persons*

The powers to apprehend without a warrant and bring back a child or young person who has escaped from the care of a fit person are exercisable where the child is taken away without lawful authority, as well as where he runs away, whether he was committed to the care of that person under the English or the Scottish Act and in any part of Great Britain (s. 1 (2)). Such powers may be similarly exercised where a child or young person escapes from any person with whom he has been boarded out by a local authority under Part II of the Children Act, 1948. Where he runs away or is without lawful authority taken away from any place where accommodation has been provided for him under Part II of that Act, such powers may be exercised by a local authority acting in the capacity of a fit person to whose care he has been committed under either the English or Scottish Children and Young Persons Act (s. 1 (3)). The offences created by section 85 of the Act of 1933 and section 89 of the Act of 1937 are extended. A person who knowingly assists or induces or persistently attempts to induce a child or young person to run away from a person to whose care he has been committed under either Act or from a place where accommodation has been provided for him under the Children Act, 1948, is liable to a maximum fine of £20 or two months' imprisonment or both. So is a person who without lawful authority takes away a child or young person from such a person or place or who knowingly harbours or conceals a child or young person who has run away or been taken away or prevents him from returning (s. 1 (4)).

*Approved schools*

Section 82 (1) of the Act of 1933 and section 86 (1) of the Scottish Act of 1937, which concern escapes from approved schools and failure to return after being absent on leave, licence or under supervision, each apply in relation to an approved school within the meaning of either of those Acts. The powers under those sections to apprehend a person without warrant and bring him back to his school or to bring him before a court of summary jurisdiction are exercisable in any part of Great Britain, provided that where the school is in England or Wales and the offender is found in Scotland, or where the school is in Scotland and the offender is found in England or Wales, he may only be brought before a court of summary jurisdiction having jurisdiction where his school is situate (s. 2 (1)). The provisions of each Act conferring the powers, protection and privileges of a constable on persons authorised to take charge of or apprehend, or to bring back or take to an approved school, a person ordered to be detained there, apply in relation to an approved school within the meaning of either of those Acts and are available in any part of Great Britain (s. 2 (2)).

*Remand homes*

The power to apprehend without warrant and bring back a child or young person who escapes from a remand home or, in the case of the English Act, from a special reception centre, is exercisable where he is taken away without lawful authority as well as where he escapes and in any part of Great Britain. A child or young person committed to custody in a remand home or a special reception centre is deemed to be in legal custody while being conveyed in any part of Great Britain to or from the home or centre (s. 3 (1)). Offences in relation to escapes from remand homes and reception centres are extended in the same way as those concerning escapes from the care of fit persons (s. 3 (2); see above). The penalties are the same.

The Act does not extend to Northern Ireland.

## Civil Aviation

AIR NAVIGATION (GENERAL) (AMENDMENT) REGULATIONS, 1956 (S.I. No. 126): operative February 4, 1956. The Regulations of 1954 (S.I. No. 925; [1954] Crim.L.R. 726), are amended. The principal change is that there are new provisions concerning the carriage of safety apparatus by public transport flying machines on flights with passengers on and after January 1, 1957 (reg. 3 (3)) and regulating the height at which public transport flying machines must fly over water on and after March 1, 1956 (reg. 3 (5)). The regulations dealing with journey log books are amended in consequence of the Air Navigation (Amendment) Order, 1956 (S.I. No. 82; [1956] Crim.L.R. 278). Other amendments concern the requirements applicable to aircraft flown within the United Kingdom on experimental or test flights, the duration of student pilots' licences, the grant of private pilots' licences and the medical fitness standards appropriate to flight navigators' and flight engineers' licences.

For penalties for contraventions, see article 67 of the Air Navigation Order, 1954 (S.I. No. 829).

## Courts-Martial

See RULES OF PROCEDURE (ARMY), (AIR FORCE), p. 347, above.

### Emergency Laws

CONTROL OF PAPER (NEWSPAPERS) (ECONOMY) (AMENDMENT No. 4) ORDER, 1956 (S.I. No. 243): operative March 4, 1956. The number of pages which a newspaper may print during the period March 4, 1956, to August 18, 1956, is prescribed.

### Food and Drugs

MILK (SPECIAL DESIGNATIONS) (SPECIFIED AREAS) ORDER, 1956 (S.I. No. 398): operative April 10, 1956. In the areas specified in the schedule to the Order special designations must be used for the purpose of all sales of milk by retail for human consumption other than catering sales.

For penalties for contraventions, see section 106 of the Food and Drugs Act, 1955.

See FOOD AND DRUGS (SCOTLAND) ACT, p. 357, below.

### Hire-Purchase

HIRE-PURCHASE AND CREDIT SALE AGREEMENTS (CONTRACTS) LICENCE, 1956 (S.I. No. 373): operative March 21, 1956. Goods not subject to control before the coming into operation of the Hire-Purchase and Credit Sale Agreements (Control) Order, 1956 (S.I. No. 180; [1956] Crim.L.R. 279) may be disposed of and possessed under agreements which do not comply with that Order if (1) the hirer had entered into a contract in writing to buy the goods before February 18, 1956; (2) the contract was valid and enforceable on March 21; (3) the goods are to be manufactured to the special order of the hirer; (4) work on the goods in fulfilment of the contract to buy had been begun before February 18, 1956.

For penalties for contravention, see regulation 92 of the Defence (General) Regulations, 1939.

### London

The following Orders have been made detailing prescribed routes: S.I. 1956, Nos. 61 (Islington); 351 (Finsbury).

### Magistrates' Courts

The following Order has been made altering petty sessional divisions: S.I. 1956, No. 298 (Lincoln, Parts of Holland).

### Medicine

DENTISTS ACT, 1956 (4 & 5 Eliz. 2, c. 29): operative on a day to be appointed. The law relating to dentists is amended and a professional body, a General Dental Council established. The

Council may by regulations authorise ancillary dental workers to undertake certain dentistry and while practising such dentistry the ancillary workers are exempt from the provisions of section 1 of the Dentists Act, 1921, which prohibits the practice of dentistry by persons other than registered dentists (ss. 18–20). Regulations may authorise a class of ancillary dental workers to use a title indicating their membership of that class and an unauthorised person who wilfully uses that title is liable on summary conviction to a maximum fine of £50. If an ancillary dental worker uses any title or description reasonably calculated to suggest that he possesses any status or qualification connected with dentistry other than that which he in fact possesses he is liable on summary conviction to a maximum fine of £50 (s. 18 (4) (5) ). With certain exceptions a person who is not a registered dentist or a registered medical practitioner may not carry on the business of dentistry unless he was doing so on July 21, 1955. The penalties for doing so are on conviction on indictment a maximum fine of £500 and on summary conviction a maximum fine of £100 (ss. 23, 25). The exception of bodies corporate under section 5 (1) of the Dentists Act, 1921, from the prohibition on their carrying on the business of dentistry will not extend to any body corporate other than one existing and carrying on the business of dentistry on July 21, 1955 (s. 24 (1) ). In certain circumstances the Disciplinary Committee may direct that such exception shall cease to extend to a body corporate (s. 24 (3) ).

No person may take or use the title of dentist, dental surgeon or dental practitioner, either alone or in combination with any other word, unless he is a registered dentist or medical practitioner and nobody may take or use any title or description implying that he is a registered dentist unless he is one. Anyone who does so is liable on conviction on indictment to a maximum fine of £500 and on summary conviction to a maximum fine of £100 (s. 27).

An offence under section 1 of the Dentists Act, 1921, which prohibits the practice of dentistry by laymen, is made punishable by a maximum fine of £500 on conviction on indictment. Summary proceedings may still be instituted and may be instituted at any time within one year from the commission of the offence (s. 28).

A registered dentist shall, by virtue of being registered, be entitled to use the description of "dental surgeon." The General Dental Council may prescribe distinctive titles for registered dentists practising in a particular branch of dentistry. A person contravening section 4 (*b*) of the Dentists Act, 1921, which relates to the use of titles and descriptions, is liable on summary conviction to a maximum fine of £50. In certain cases a dentist's diploma may be entered in the register in an abbreviated form and if this is done the dentist may not take or use, or affix to or use in connection with his premises, any other abbreviation. If he does so he is liable on summary conviction to a maximum fine of £50 (s. 30).

Section 40 of the Dentists Act, 1878, in so far as it authorises the recovery of penalties in Scotland before two justices ceases to have effect (s. 31 (3) ).

The Act extends to Northern Ireland.

THERAPEUTIC SUBSTANCES (CONTROL OF SALE AND SUPPLY) REGULATIONS, 1956 (S.I. No. 346): operative March 31, 1956. The Penicillin Act, 1947, as amended, now applies to bacitracin, tetracycline and its salts, viomycin and its salts, and to any substance the chemical and biological properties of which are identical with or similar to those of bacitracin or viomycin, or of any salt of viomycin, but which is not produced by living organisms.

For offences see section 12 of the Therapeutic Substances Act, 1956, which replaces section 3 of the Penicillin Act, 1947 (see below).

THERAPEUTIC SUBSTANCES ACT, 1956 (4 & 5 Eliz. 2, c. 25): operative April 15, 1956. The Therapeutic Substances Act, 1925, the Penicillin Act, 1947, the Veterinary Surgeons Act, 1948, the Penicillin (Merchant Ships) Act, 1951 and the Therapeutic Substances (Prevention of Misuse) Act, 1953, are consolidated. For offences and penalties, see section 6 and section 12.

### Pensions

See POLICE PENSIONS REGULATIONS, p. 354, below.

### Pest Control

IMPORTATION OF NEW POTATOES AND RAW VEGETABLES ORDER, 1956 (S.I. No. 372): operative March 21, 1956. The Importation of Plants Order, 1955 (S.I. No. 81; see [1955] Crim.L.R. 196) is modified. New potatoes grown in France, Portugal or Spain may be landed in England and Wales during different periods between March 21 and June 15. Such potatoes must have been grown at least two kilometres from any place where wart disease or black scab or ring rot has occurred at any time and in a district where there is an intensive system of control of colorado beetle; they must have been riddled and thoroughly washed and should be free from soil and colorado beetle infestation. Certain raw vegetables, including cauliflowers, carrots and globe artichokes, grown in the Louvain and Malines districts of Belgium, in France, or in the Westland district of Holland, or on the Islands of the Province of South

Holland, may be imported during different periods between April 1 and October 15. Such vegetables must have been examined by an authorised officer in the country where they were grown and must have been grown in a district where there is an intensive system of control of colorado beetle.

Except so far as they are inconsistent with this Order the relevant provisions of the Order of 1955 apply to the landing of such potatoes or raw vegetables. For penalties for contraventions, see article 14 of that Order.

### Poison

See AGRICULTURE (POISONOUS SUBSTANCES) (ORGANO-MERCURY COMPOUNDS) ORDER, p. 347, above.

### Police

POLICE PENSIONS REGULATIONS, 1956 (S.I. No. 385): operative April 1, 1956. The Regulations of 1955 (S.I. No. 480; [1955] Crim. L.R. 392) are amended, the principal changes relating to a new scheme for widows' ordinary pensions. The rate of contribution of policemen is increased from 5 per cent to 6¼ per cent., but regular policemen, serving on April 1, 1956, are given the choice of continuing to pay contributions at the old rate or paying at the increased rate.

See POLICE (SCOTLAND) ACT, p. 357, below.

### Practice

CRIMINAL JUSTICE ADMINISTRATION ACT, 1956 (4 & 5 Eliz. 2, c. 34): operative March 28, 1956. Two new courts are to be established in Liverpool and Manchester for criminal trials. They are to be known as Crown Courts and that in Liverpool will act in and for West Derby division of Lancashire, that in Manchester in and for the Salford division. Each of the courts will be set up by commissions of oyer and terminer and gaol delivery for the court's division addressed to judges of the High Court, the recorders of the two cities or to persons named therein as commissioners of assize. Unless otherwise directed by the Lord Chancellor, sessions of the courts will be held at least eleven times in every year at times to be fixed by the courts or one of their judges. The courts will exercise any jurisdiction or powers which would be exercisable by a court of quarter sessions in either city, and the courts of quarter sessions will not sit. A number of provisions are made concerning the powers of the judges in the new courts, the effect of the establishment of the courts, the status, salary and pensions of the recorders of Liverpool and Manchester, the officers of the new courts, the divisions of Lancashire for assizes, the transfer to Lancashire of the part of Stockport now in Cheshire, the provision of court-houses and the costs of assize courts and jury service (ss. 1–11). Certain transitional provisions are contained in Schedule 1.

### *Miscellaneous provisions*

The Act also makes a number of miscellaneous amendments to the existing law concerning the administration of criminal justice.

The recorder, deputy or assistant recorder of any borough having a separate court of quarter sessions shall be deemed to be a legally qualified chairman in relation to that court for the purposes of the Administration of Justice (Miscellaneous Provisions) Act, 1938, s. 2, under which a court of quarter sessions has an extended jurisdiction at a session presided over by a legally qualified chairman (s. 12).

A recorder of a borough having a separate court of quarter sessions and a paid chairman or deputy chairman of the quarter sessions for the county of London appointed after March 28, 1956, and a metropolitan stipendiary magistrate, whenever appointed, must retire at the end of the completed year of service in the course of which he attains the age of seventy-two. The Lord Chancellor may authorise him to remain in office longer, but not beyond the age of seventy-five. A recorder of a borough having a separate court of quarter sessions may be removed from office by the Lord Chancellor for inability and so may a paid chairman or deputy chairman of London Sessions (s. 13).

Section 14 provides for the payment of persons acting temporarily in the office of a recorder of a borough during a vacancy.

The power of a recorder under section 168 of the Municipal Corporations Act, 1882, to form a second court is extended and he may form such number as may be authorised by a resolution of the borough council. An assistant recorder may exercise his jurisdiction and powers whether or not the recorder is sitting in quarter sessions (s. 15).

Certain functions of the Secretary of State concerning the pensions of chairmen and deputy chairmen of the court of quarter sessions for the county of London, the salary, retirement and pensions of stipendiary magistrates and the appointment of deputy stipendiary magistrates are transferred to the Lord Chancellor and the Chancellor of the Duchy of Lancaster (s. 16).

After the end of March, 1956, a borough having a separate commission of the peace will not be chargeable for expenditure of the county council in respect of the costs of magistrates' courts, nor, if the borough has a separate court of quarter sessions, for expenditure of the county council in respect of the costs of quarter sessions (s. 17). The costs to which the section refers are defined.

The constitution of the court of quarter sessions for the county of London for the purposes of appeals is altered (s. 18).

After March 28, 1956, rules of court under the Criminal Appeal Act, 1907, and rules under the Indictments Act, 1915, will be made by the Rule Committee of the Supreme Court. The Lord Chancellor may appoint two persons appearing to him to have special experience in criminal procedure, one being a practising barrister and one a practising solicitor, to be members of the Committee when it exercises the powers so transferred (s. 19).

The Criminal Appeal Act, 1907, s. 16 (2) is amended and the Secretary of State may direct a transcript of shorthand notes taken at a trial on indictment to be made and furnished to him, even though not for his own use (s. 20).

The Act does not extend to Scotland or Northern Ireland except in so far as the new arrangements as to the administration of justice in Lancashire affect the operation of the law of those countries in relation to courts in England and Wales.

## Probation

PROBATION RULES, 1956 (S.I. No. 350): operative March 15, 1956. The salaries of whole-time probation officers are increased by amounts from £25 to £45. Special provision is made for women officers whose pay is gradually being made equal to that of men officers.

## Revenue

CONTROL OF BORROWING (AMENDMENT) ORDER, 1956, (S.I. No. 358): operative March 14, 1956. Without the consent of the Treasury no person may carry out any transaction of the kind described in the Order of 1947 (S.R. & O., No. 945) if the total value of such a transaction together with the value of all previous transactions carried out by the same person in the previous twelve months exceeds £10,000 and not £50,000 as before.

For penalties for offences, see rule 1 of Schedule I of the Borrowing (Control and Guarantees) Act, 1946.

## Scotland

### *Approved schools*

APPROVED SCHOOLS (CONTRIBUTIONS BY EDUCATION AUTHORITIES) (SCOTLAND) REGULATIONS, 1956 (S.I. No. 362): operative

April 1, 1956. The contribution payable by an education authority named in an approved school order to the expenses of the school managers is increased to 75s. 6d. a week.

*Birds*

WILD BIRDS ORDERS, 1956, RAVENS IN ARGYLL (S.I. No. 332): operative March 6, 1956; POSSIL MARSH SANCTUARY, GLASGOW (S.I. No. 333); COUNTY OF THE CITY OF GLASGOW REVOCATION (S.I. No. 334): both operative March 19, 1956. Ravens may be killed or taken by authorised persons, except on Sundays and on Christmas Day, in the county of Argyll. A prescribed area in Glasgow is made into a bird sanctuary, called the Possil Marsh Sanctuary. It is an offence for anyone wilfully to kill, injure or take any wild bird or to attempt to do so or to take or destroy an egg of any wild bird in the sanctuary. Only persons authorised in writing by the Scottish Wild Birds' Sanctuaries Trust may enter the sanctuary. The Wild Birds Protection (County of the City of Glasgow) Order, 1925 (S.R. & O., No. 309) is revoked.

For penalties for contraventions, see section 12 (2) of the Protection of Birds Act, 1954.

*Children and young persons*

See CHILDREN AND YOUNG PERSONS ACT, 1956, p. 348, above.

*Food and drugs*

FOOD AND DRUGS (SCOTLAND) ACT, 1956 (4 & 5 Eliz. 2, c. 30): operative on a day to be appointed. A number of enactments relating to food and drugs are consolidated with certain amendments.

*Police*

POLICE (SCOTLAND) ACT, 1956 (4 & 5 Eliz. 2, c. 26): operative on a day to be appointed. A number of enactments relating to police forces in Scotland, and to the execution of warrants in the border counties of England and Scotland are consolidated, with certain amendments.

# Practical Problems

*All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 3 Chancery Lane, London, W.C.2." The questions of subscribers only are answerable in the Review. All questions should be submitted in duplicate. The Publishers cannot accept any responsibility for the correctness of the replies.*

### 5. *Variation of order for compensation*

A was convicted by my justices of the larceny of a watch valued at £30, the property of B. A stated that he had hidden the watch in a hedge, but evidence was given at the trial that in spite of an exhaustive search by the police the watch could not be found. A was fined and the court also ordered him to pay to B £3, in part compensation for the loss of the watch.

A applied for time to pay and was allowed to pay the fine and £3 by instalments of 10s. per week. The whole of the amount has now been paid except £1.

The watch was recently found by some workmen in the place where A said he had hidden it, but, from its condition, it is obvious that it had only just been put there. A now inquires whether he has to pay the balance of £1 to B.

My view is that the watch must, of course, be handed to B, and that the magistrates have no power to alter their order with regard to the payment of the £3 by A to B. Do you agree with this view? If you do not, what authority is there that the justices can now alter their original order? [W. P. F.]

#### ANSWER

The magistrates have no power to alter their order, although B will now get his watch back. They could refuse to enforce payment of the balance due, but they might well regard B as deserving of this compensation for the loss of his watch during the period in question. [A. E. J.]

### 6. *Presence of officer in charge of case at identification parade*

In an article on "Identification Parades" at [1955] Crim.L.R. 525, at p. 527, last paragraph, you say that there is no objection to the presence of the officer in charge of the case at the identification parade. In my force there is an order specifically excluding the officer in charge of the investigations from attending the parade. Can you please enlarge on your view? [P. F.]

### ANSWER

Where such a rule as is quoted exists, its origin may probably be traced to some allegation, successful or otherwise, that the officer in charge of the case did, on some occasion, interfere with the identification of the suspect by the witness. Perhaps it was said that he gave some hint, or made some gesture, which might be supposed to have helped the identifying witness to make his identification. It is our opinion that such an event ought properly to be prevented by the officer in charge of the parade exercising an effective control of the proceedings, rather than by the dubious expedient of excluding the officer in charge of the case. As the article quoted goes on to point out, the mere absence of the officer in charge of the case from the parade is no guarantee that he is not interfering with the witness or influencing his judgment, whereas if the officer in charge of the case is actually present at the parade, and can be seen by the suspect and his legal adviser to be taking no part in the identification, you have the best guarantee of all of the spontaneity of the identification. It seems to us to be merely a practical approach to the problem, based upon police experience, and leading to a practical and rather elementary precaution.

[N. W.]

### 7. *Procedure where police officer conducting case incapacitated*

Summonses have been taken out by the police against the driver and the owner of a car for using it on a road with the handbrake in a defective condition. The constable who interviewed the second defendant and obtained an admission of his ownership of the vehicle, has since met with a serious accident and it may be some months before he is able to appear in court to give evidence. As the case is not a serious one, the police wish, if possible, to avoid asking for an adjournment for a long period. Would there be any objection to another officer interviewing the owner now with a view to obtaining a repetition of the previous admission? As usual in this type of case, there is no other evidence against the owner.

[G.]

### ANSWER

Since the defendant is not in custody the Judges' Rules are not, on a strictly literal interpretation, applicable to the situation; nor, for the same reason, are the various cases in which judges have criticised questioning of an accused by the police. But, in view of the fact that proceedings have actually been instituted against the owner of the car, the suggested questioning would undoubtedly offend against the spirit of the dicta referred to—more especially as its purpose would be to obtain from the defendant the only evidence on which he could be convicted. Is not the injured officer able to sign a certificate as to the defendant's admission, which could be used in evidence under the provisions of section 41 of the Criminal Justice Act, 1948? A short adjournment of the summons could be applied for if necessary to ensure that a copy of the certificate would be served on the defendant at least seven days before the date of hearing. [A. E. J.]

# *Letters to the Editor*

## The Fraudulent Intent in Larceny

Sir,

Wing-Commander J. T. Lowe, in an article at [1956] Crim.L.R. 78, cites the following hypothetical case (p. 85) in considering the legal meaning of the word " fraudulently " which appears in section 1 of the Larceny Act, 1916:

> " The accused takes the thing out of the owner's possession knowing that the owner does not consent to his possession and decides to keep it permanently, but intends to recoup the owner later for his loss. Further, he honestly believes that if the owner had been asked he would have consented to what he, the accused, did."

The author comments (p. 86) that " such cases as the one postulated above would be exceedingly rare. . . ."

It may interest your readers to record that a case recently fell to be decided by my bench where the facts were on all fours with those of the hypothetical case cited above, and where it was necessary for the bench to consider in particular the legal meaning of the word " fraudulently " contained in the section referred to.

The case concerned two farmers, both of whom farmed in the same village. The defendant was charged on an information laid by the prosecutor with larceny of a bale of hay valued at 7s. 6d., the property of the prosecutor, contrary to section 2 of the Larceny Act, 1916. The facts briefly were that the defendant was the owner of a herd of cows which were kept on his land, which adjoined that of the prosecutor. On the day in question the defendant had fed his cows in the morning. He had worked late that day, and when on his way home he heard his cattle bellowing he decided to feed them again. He went to get his van to take the hay to the cattle, but was unable to get the van to start. There was not sufficient of his own hay near at hand, and the defendant said he thought the prosecutor would not mind him borrowing a bale of hay considering the position he was in. He trusted that the prosecutor would be a good neighbour. He had no intention of stealing the hay and honestly believed that the prosecutor would not mind him borrowing the hay. He had every intention of recouping the prosecutor the next morning and had ample stocks from which he could draw. Defendant said it was common practice among farmers to help one another by borrowing and lending. The prosecutor found the defendant in possession of the hay after he had taken it. Defendant said he tried to explain the position to the prosecutor but he " would not listen to reason," whereupon the bale of hay was returned by the defendant. There was no evidence of any enmity between the prosecutor and the defendant. The defendant, who was a churchwarden, called evidence of good character. It was contended for the prosecutor that the defendant intended permanently to deprive him of the bale of hay in that he intended to feed it to his cattle, and that all the necessary ingredients which constitute the offence of larceny had been proved. It was contended for the defendant that he had no *animus furandi* when he took the bale of hay, and further, that it was not taken " fraudulently " within the meaning of section 1 of the Larceny Act, 1916. Although he would not have been able to return the identical bale of hay had he fed it to his cattle, he intended to recoup the prosecutor fully and was in a position so to do.

The justices considered the cases of *R.* v. *Riley* (1853) 22 L.J.M.C. 48; *R.* v. *Williams* [1953] 1 All E.R. 1068, and *Ruse* v. *Read* [1949] 1 K.B. 377.

The defendant was found not guilty, and the case was dismissed.

Yours faithfully,

R. H. HARBOUR,

Clerk to the Justices.

*Yeovil.*

# Books and Periodicals

## Reviews:

*The Road to Justice.* By the Right Honourable Sir Alfred Denning, one of the Lords Justices of Her Majesty's Court of Appeal in England. London: Stevens & Sons, Ltd. 1955. viii and 118 pp. (10s. 6d. net.)

This book is composed of lectures delivered in South Africa, Canada and the United States. Their theme is the duty of lawyers to ensure not merely that the law is enforced but that it is just and justly administered. Such a duty is sometimes difficult to reconcile with the doctrine of precedent. For example, Lord Justice Denning believes that it is unjust for a company to insert into its standard form of contract terms " which are wide enough to bar well-founded claims." But surely precedent obliges the courts to enforce such " unjust " terms? Perhaps it is significant that the author remarks that the suggestion that such conditions be held invalid if unreasonable (like by-laws), has not *so far* been accepted by the courts.

Lord Justice Denning emphasises the importance in the administration of justice of the quality of judges and lawyers, and much of the book is devoted to a discussion of their rights and responsibilities and to the rebuttal of charges sometimes made against them. The divided profession and small Bar are seen as a great help in maintaining standards. Legal Aid, on the other hand, while remedying a great defect, presents a challenge to the high principles of lawyers.

The importance to fair trial of a free press is insisted upon. " The courts " it is said, " are as much open to fair criticism as anyone else." Yet if an editor says that a judge has behaved unjustly he may be committed for contempt. A barrister may be punished by his Benchers for voicing similar criticism. Lord Justice Denning recognizes that judges have behaved unjustly in the past. They may do so again, but neither the press nor the Bar—the only people who really know—may say so.

Though most of the author's illustrations are, naturally, taken from the civil law, many of the problems considered are fundamental to criminal justice and criminal lawyers will find much to interest them.

J. C. Smith.

*The Hamlyn Lectures : The Proof of Guilt.* A Study of the English Criminal Trial. By Glanville Williams, LL.D., Fellow of Jesus College, Cambridge, Barrister-at-Law. London: Stevens & Sons, Ltd. 1955. viii and 294 pp. (17s. 6d. net.)

The Hamlyn Lectures for 1955 have been devoted by Dr. Williams to a consideration of those characteristics of the English criminal trial which he considers stand out to the foreign lawyer as matters for inquiry and comment. Each of these features is subjected to a searching examination designed to determine the extent to which it promotes the conviction of the guilty and the acquittal of the innocent. The same criterion is used in making comparison with the corresponding features of foreign systems.

Some of the most notable characteristics of the English trial are condemned as rules which serve only to protect the guilty. The immunity of the accused from questioning should give way, it is suggested, to interrogation by the prosecutor, which would have the advantages of the French system of questioning by the judge, but avoid its appearance of harshness. Failing so radical a reform, we should allow prosecuting counsel to comment upon the accused's failure to testify. Jury trial results in acquittals " where, on a reasonable view, guilt is clearly established," and furthermore, creates opportunities for appeal on technical points. The interesting alternative suggested is trial by a judge with two or more lay magistrates as assessors.

On the other hand, the accused is thought to be insufficiently protected in some respects. The rule requiring corroboration of accomplices as laid down in *Davies* [1954] Crim.L.R. 305 is too narrow. Juries do not recognise the unreliable nature of identification evidence and are not properly cautioned upon it. The powers of the Crown to cross-examine a defendant-witness as to character under the Criminal Evidence Act of 1898 are too wide.

It will be seen from these examples that some of the reforms suggested are revolutionary, but the case is so persuasively argued as to give even the most conservative food for thought. All the traditional arguments in favour of jury trial, for example, are very fairly examined and rejected. The praise traditionally bestowed upon it is shown to be based on little or no evidence.

The book should fulfil admirably the object of the Hamlyn Trust—the furtherance of knowledge of the law among the " Common People." No intelligent layman would have any difficulty in understanding these lectures; and they should certainly be read by every lawyer.

J. C. SMITH.

*The Essentials of Forensic Medicine.* By C. J. Polson, M.D.(Birm.), F.R.C.P.(Lond.), Barrister-at-Law, Professor of Forensic Medicine, University of Leeds. London: English Universities Press, Ltd. 1955. x and 539 and (index) 21 pp. (30s. net.)

Professor Polson's presentation of the subject is rather different from that of other authors of well-known textbooks covering a similar field. Toxicology is completely omitted, it being the intention of the author to deal with this subject in a separate volume, now in preparation. Modern toxicology is really a subject by itself and is better treated separately since it is included only to a very limited extent in the ordinary medical curriculum.

Apart from the frontispiece there are no illustrations, the material is presented " in textual form, without pictorial aids or classification, because the aim is to focus attention on the text."

This detracts somewhat from the wider appeal aspect. The book is an amplification of University lectures and is primarily intended to meet the needs of undergraduates; to such readers, illustrations will no doubt be provided by actual exhibits, demonstrations, lantern slides, etc., in which case textbook illustrations are less necessary.

It is hoped, however, that the volume will be of value to lay readers such as coroners, magistrates, barristers, solicitors, police officers, who will not have the advantage of the illustrations available to medical students; to such readers a selection of illustrations would be of value.

On the other hand the complete elimination of illustrations has enabled the author to give a very comprehensive account of the subject, whilst keeping down the size of the volume and cost of production. The descriptive style in some measure compensates—though not entirely—for the absence of illustrations. Chapters I to XXII deal with essentially the usual medical problems and examinations; Chapters XXIII to XXXI with medico-legal aspects. Chapter IV (pp. 39–89), "Identification," is strictly a matter for the police, to whom it will be particularly useful, an appendix to this chapter (pp. 89–103), contains an account of cases illustrating identification.

A feature of the book is a comprehensive list of references, both in the text and at the end of each section for those particularly interested in a specialised section. Within the limits of a relatively small volume the author has collected a wealth of material and presented a textbook dealing with the essentials of forensic medicine, in a very interesting and attractive style.

J. B. FIRTH.

*International Review of Criminal Policy No. 7–8, 1955.* The Prevention of Juvenile Delinquency. United Nations.

In presenting comparable facts and figures, this review displays a determination to grapple with the universal problems of juvenile delinquency. It deplores the recent trend to broaden the concept of juvenile delinquency and bring within the definition such anti-social behaviour as vagrancy, maladjustment and predelinquency characteristics. The review presses for the use of the phrase only where a juvenile has committed a criminal offence.

The review traces a world-wide tendency to raise the age at which juvenile delinquency ends. A very marked preference is shown for 18 years, as compared with 17 years in the United Kingdom. The pertinent question arises in each country: if the age is raised, are there adequate services to meet the increased load in order that the aim of rehabilitation by the special services is not defeated?

Clear evidence is given that juvenile delinquency becomes a problem in those countries in which industrialisation increases. The report wisely refrains from giving either one single cause or one single cure, but emphasises that there are no specific determining factors.

The review offers more help and useful material when dealing with causation rather than prevention, although it warns one that all conclusions, methods and techniques cannot be transplanted. If little new is presented in the realm of prevention, at least the review reveals a strong streak of common sense in stating that "preventive policies should aim at enabling the minor to behave in accordance with an accepted system of values and not in accordance with a system of his own which may be in conflict with the former."

JEAN GRAHAM HALL.

*A Guide to Juvenile Court Law.* Fourth edition. By Gilbert H. F. Mumford, Solicitor, Clerk to the Justices, Luton Borough. London: Jordan & Sons, Ltd. 1955. xxiii and 181 and (appendix) 9 and (index) 10 pp. (12s. 6d. net.)

The fourth edition of this book incorporates the amendments made necessary by enactments of the years 1950–1953, but otherwise keeps its previous form. This brings together under convenient headings the law relating to juvenile court work and ancillary matters. At the expense of some duplication of material the method produces a very convenient reference work, which an excellent index makes still more easy to use. To a large extent the text reproduces the actual wording of the Acts and Statutory Instruments referred to; where paraphrase and abbreviation are employed, the usual ambiguities are occasionally to be found; and in the section dealing with the Mental Deficiency Act the heading " Finding of Guilt unnecessary in the Case of a Charge " is a definite mis-statement. In view of the fact that editorial annotation has been kept to a bare minimum it is rather surprising that some of the opinions expressed in very positive terms are on matters where different views are cogently argued. The lay-out of the book is clear, and typographical devices are used effectively; but, even in these days of lax spelling, surely " admissable " (which occurs several times) is not admissible.

The author, who is a solicitor and clerk to the Luton Justices, has undoubtedly written a book admirably suited to the needs of magistrates' clerks, solicitors, police officers and others whose concern is with technical points of law; it would, however, make difficult and somewhat unrewarding reading for anyone who merely wished to get a general picture of the legal machinery of a juvenile court. It is, in fact, more a compendium of, than a guide to, juvenile court law.

A. E. JONES.

*Evidence and Procedure in Magistrates' Court.* Second Edition. By William Shaw, M.A. London: Butterworth & Co. (Publishers), Ltd. 1955. xi and 106 and (index) 9 pp. (10s. 6d. net.)

This second edition of William Shaw's small book—the first edition appeared in 1946—will help those who require a basic knowledge of the law as it is applied to the procedure of a Magistrates' Court. The law is set out in an easily readable form and the book provides a concise but adequate guide to court work. Furthermore, the effects of more recent legislation, including the Magistrates' Courts Act, 1952, are made very clear.

It is not every writer who can interpret and describe the law in simple terms. William Shaw not only has this ability but reveals a talent for selecting well-chosen examples to illustrate his points. This adds interest to the book and consequently must increase its teaching value.

Mr. Shaw's new work will prove valuable to the lay justice, the police officer and all others who are concerned with the work of the magistrates' courts.

CHARLES E. DYER.

*Counterfeit.* By Sonia Cole. London: John Murray. 1955. vii and 202 and (references and index) 6 pp. (15s. net.)

There are those who delight in the battle of wits between counterfeiter and investigator and this book is offered to them as "the first to treat the fascinating subject of forgery as a whole" with "modern scientific methods of detection discussed fully and simply." Considerable claims for a book of but two hundred pages, written by an archaeologist who, it soon becomes obvious, has little more than a nodding acquaintance with these modern methods of analysis, which have played such a vital part in the exposure of forgeries with which she deals.

It would prove a difficult task even for a worker in these fields to deal at all adequately in such a small compass with the abstruse and difficult techniques employed, and the misleading and incorrect statements which characterise this aspect of the book shows that the task is beyond the capacity of the authoress.

As might be expected, those chapters dealing with archaeological matters make the best reading, but the standard of the remainder is uneven, by far the least satisfactory being the treatment of document examination, apparently accomplished by the abstraction of a couple of reference books written a generation ago.

The list of references at the end should prove useful to anyone who wishes to learn more about the cases mentioned in the text.

WILSON R. HARRISON.

*Nick of the River.* The story of Detective Inspector Nixon, late of the Thames Division, Metropolitan Police. By Anthony Richardson. London: George G. Harrap & Co., Ltd. 1955. 256 pp. (15s. net.)

*Boss of Britain's Underworld.* By Billy Hill. London: The Naldrett Press, Ltd. 1955. 223 and (glossary of underworld terms) 8 pp. (18s. net.)

These two books present a striking contrast, both in the subject-matter and in style.

*Nick of the River* is the story of the life of a police officer, Inspector Nixon, who finished his career in the Thames Division, commonly known as the River Police. It is extremely well written and full of interest from beginning to end. Nixon emerges as a typical example of the finest type of police officer, courageous, resourceful and devoted to his duty, and the story of his career and some of his cases makes fascinating reading. This is a first-rate book about a first-rate man.

*Boss of Britain's Underworld* purports to be the autobiography of a crook, Billy Hill. Obviously written by a journalistic "ghost," it is couched in a pretentious style made more irritating by the continual use of the underworld slang, which necessitates constant reference to the back of the book. If the author is to be believed, Hill had a hand in most of the major crimes, solved and unsolved, of the past few years, yet managed to escape the retribution which was obviously his due. The book is a sickening example of the glorification of the crook which some sections of the press seem to find necessary to maintain their circulation, and on that account alone is to be deplored. Apart from that, far from being enthralling as the publishers seem to think, this reviewer found it boring in the extreme.

M. W. M.

*Pageantry of the Law.* By James Derriman, Barrister-at-Law. London: Eyre & Spottiswoode. 1955. 215 and (index) 9 pp. (25s. net.)

Very few people possess a full knowledge of the history and traditions of their profession and this book is therefore welcome because it covers so well a profession full of pageantry. The history of both solicitors and barristers is dealt with, together with all branches of the judiciary from the Lord Chancellor down to the justices of the peace. The book is the fruit of much research, and many readers, laymen and lawyers, will find it extremely useful. References abound and are irritatingly placed in the text, but this latter defect is a very minor one.

P. A.

*Materialien zur Strafrechtsreform. 2. Band, Rechtsvergleichende Arbeiten.* I. Allgemeiner Teil; Bonn, 1954; II. Besonderer Teil, Bonn, 1955. Obtainable from Dr. Hans Heger, 20 Rheinallee, Bad Godesberg.

In the last fifty years, German criminal law has been in a state of constant reform. The Criminal Code of 1871 has been modified and supplemented by numerous amendments, but after a long series of Draft Codes work is once more in progress with the ultimate aim of an entirely new codification. In the first preparatory stage of the work, and before its recent resumption, comprehensive studies in comparative law were undertaken. In the years 1906–1909 a team of the leading criminal lawyers produced a Comparison of German and Foreign Criminal Law in 16 volumes. After this broad foundation a condensed comparative survey of the principal topics of criminal law was needed to take stock of the legal position today. At the request of the Federal Ministry of Justice new studies were undertaken at the Institute for Foreign and International Criminal Law of the University of Freiburg i.B., which has developed into an important centre of comparative research. The results of the new investigations are now presented in two volumes, one containing contributions to questions of the General Part, and the second to definitions and legal ingredients of particular offences. Individual authors are responsible for each single topic. The work, intended to facilitate the task of the new Reform Commission, is primarily concerned with legal aspects of the reform. It shows, within the legal sphere, the variety of solutions of similar legislative problems in contemporary systems of criminal law. Beyond its immediate purpose, the carefully documented work will prove a most valuable source book for any further research in the field of comparative criminal law.

M. GRUNHUT.

**Books Received:**

*A New Study of Police History.* By Charles Reith. London: Oliver & Boyd. 1956. viii and 288 and (index) 6 pp. (18s. net.)

*Critical Years at the Yard.* The Career of Frederick Williamson of the Detective Department and the C.I.D. By Belton Cobb. London: Faber & Faber. 1956. 240 and (bibliography, police officers and index) 11 pp. (15s. net.)

*Friends at Court.* By Henry Cecil. London: Michael Joseph. 1956. 208 pp. (12s. 6d. net.)

*A General History of the Pirates.* By Captain Charles Johnson. Edited by Arthur L. Hayward. London: Routledge & Kegan Paul, Ltd. 1956. xvi and 595 and (index) 7 pp. (30s. net.)

*A Guide to Modern Police Thinking.* A panoramic view of policing. By Raymond E. Clift. Cincinnati: The W. H. Anderson Co. Sweet & Maxwell, Ltd. 1956. xviii and 333 and (table of criminal statutes, index and bibliography) 36 pp. (£2 15s.)

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## Reader's Digest:

*Trial*: Mr. W. E. Denny examines the decision in *R.* v. *Hepworth and Fearnley* [1955] Crim.L.R. 576 and considers the importance of the direction as to burden of proof at 19 *Modern Law Review* 194.

*Magistrates*: Some aspects of the duties of a chairman of a magistrates' court are considered in the March issue of *The Magistrate* at p. 30.

*Police and children*: M. Charles, Procureur du Roi in Brussels, considers the duty of the police towards children in the *International Criminal Police Review*, February, 1956, at p. 41. The Chief Constable of Liverpool describes the use of police juvenile liaison officers in that city, and their success, in the *Police College Magazine*, Spring, 1956, at p. 120.

*Borstal training*: Indicating the importance of a boy's personal relationships in a Borstal institution Mr. Rose makes some observations on their social groupings: 6 *British Journal of Delinquency* 202.

"*Truth*" *drugs*: The problems raised by the use of drugs in the examination of suspected criminals are considered in the *Journal of Forensic Medicine*, Vol. 3, No. 1, at p. 2, and narco-interrogation carried out at the University of Minnesota is described at p. 9.

*Malicious wounding*: What constitutes malice in cases of malicious wounding where a person is injured when seeking to escape from harm threatened by another is considered at 221 *Law Times* 147.

*Food and drugs*: The effect of the decision in *Thrussell* v. *Whiteman* [1956] Crim.L.R. 195 in cases where food is alleged not to be of the quality demanded is considered at 120 *Justice of the Peace* 132.

*Stolen cars*: Devices to prevent parked vehicles being taken and driven away are examined in the *Police Review*, March 9, 1956, at p. 168.

*Murder*: There is no capital punishment for murder in Norway, whose experience concerning this crime is described at 120 *Justice of the Peace* 147.

# THE
# CRIMINAL LAW REVIEW

*Editors*

JOHN BURKE and PETER ALLSOP, M.A.

*Barristers-at-Law*

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## *Editorial*

### Old Bailey chronicle

On March 26 the Court of Criminal Appeal dismissed the appeals of Schack and Goldstein against their convictions for conspiring together with other persons to pervert the course of public justice in connection with the trial of Jack Comer. The only matter of any interest in the appeal was that Goldstein argued that he was not guilty of the offence charged in that the particulars of that offence and the evidence given only disclosed an offence under section 7 of the Perjury Act, 1911, of procuring or suborning another to commit perjury. The court held that there was nothing in this point.

A green bus ticket led to the conviction of a murderer at the Old Bailey on April 27, and possibly prevented the wrongful conviction of another man for the crime. A woman was found stabbed at the seamen's outfitters shop which her husband kept in Limehouse. A metal cashbox taken from the shop was found on waste land at Portsmouth. It bore the fingerprints of one Clarke, a thief recently released from prison, who had come to London two days before the murder and returned to the South Coast soon after. A search for him began. Meanwhile a green bus ticket was found in the fold of a lining in a pocket of a bloodstained jacket found lying beside the woman's body. The ticket was for a 1s. 2d. fare from Ynyshir, a village in Glamorgan. The Glamorgan police sent to Scotland Yard the description of a man, one Kemp, who had been away from the village nearly two weeks. This tallied with the description given by the dead woman's husband of a man who had been in the shop the day before the murder. Kemp was found in London and charged with the murder. An epilogue to this case took place at London Sessions where Clarke was sentenced to twelve months' imprisonment for stealing from Kemp articles which the latter had taken from the shop in Limehouse. Apparently Clarke had agreed to buy them and when the two men met, he picked up the articles and disappeared.

On the same day that Kemp was convicted, four men were sentenced to imprisonment for terms varying from twenty-one months to six months for their part in a conspiracy whereby driving licences were issued to persons who had not passed the driving test. Three were found guilty and one pleaded guilty to conspiracy to effect a public mischief. The jury were discharged from returning verdicts on further charges of conspiracy to contravene the provisions of the Road Traffic Act, 1930, and the Motor Vehicle (Driving Licences) Regulations, 1950.[1]

### Murder

Who are the people we hang? A pamphlet,[2] "Patterns of Murder," which was published recently, records the cases of the eighty-five murderers executed during the five years, 1949–1953, and reveals many interesting facts. About seventy cases seem to belong to the categories of *crime passionnelle* and crimes of the disordered mind. In the majority of cases the prosecution did not deny that the accused was mentally abnormal, but denied that he was insane according to the McNaghten rules. There is only one case of a cold-blooded, premeditated murder for gain. In fourteen cases the jury made a recommendation to mercy, but mercy was refused.

The information in the pamphlet is useful in that it may correct the misconceptions concerning the type of person who is executed and provide a more realistic foundation for the present debate on whether capital punishment should be abolished.

The Death Penalty (Abolition) Bill was considered in committee in the House of Commons on April 25 and May 16.[3] The debate was adjourned.

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[1] See *The Times*, April 28, 1956.

[2] This pamphlet may be obtained for 1s., post free, from *The Observer*, 22 Tudor Street, E.C.4.

[3] H.C. Debates, Vol. 551, cols. 1787 *et seq.*; Vol. 552, cols. 2027 *et seq.*

## The Royal Prerogative

The Home Secretary when addressing the North-Eastern Branch of the Magistrates' Association on April 22 spoke of the exercise of the royal prerogative of mercy. He pointed out that the prerogative is continually being exercised to right wrongs or to extend clemency in what may be quite minor cases, although it is usually only the more sensational cases which attract attention. He said: "The Home Secretary, in considering petitions for the exercise of the royal prerogative, does not act as a court of appeal, and does not attempt to re-try the case on paper. He does not advise any interference with the conviction or sentence merely on the grounds that if he had been on the bench or in the jury-box he might have voted "not guilty," or that he might have imposed a different sentence. He must have stronger and more specific grounds than this before he can recommend any interference. In the second place, where the petition is to the effect that an innocent man has been wrongly convicted there must normally be fresh evidence, which was not before the court, to justify any interference. Before taking any action the Home Secretary will communicate with the court, and invite their opinion on the fresh evidence, or if there has been a conviction on indictment, refer the case to the Court of Criminal Appeal, unless it is plain that an innocent man is being wrongly detained in prison, in which case his immediate discharge must be authorised. Where the petition is to the effect that the sentence was unduly harsh there must normally be fresh facts, that were not before the court when they decided what sentence to impose, or a change of circumstances since the conviction, to justify any interference, and here again the Home Secretary will consult the court wherever possible."

## Cinematograph licences

A possible retrospective effect of the Cinematograph Act, 1952, was considered by the Essex Quarter Sessions recently. The Act which came into force on January 1, 1956, gives a licensee a right to appeal to quarter sessions against a condition in a licence granted under the Cinematograph Act, 1909. Prior to this there had been no such right. Some licences were issued on October 1, 1955, and the Chairman of Essex Quarter Sessions gave their holders leave to appeal out of time against conditions contained in those licences. When the appeals were heard on March 8, preliminary objection was taken by counsel on behalf of the county council that there was no right of appeal as the licences had been issued before January 1. The bench upheld this objection and the appeals were dismissed.

### Caravan parking

Under the Public Health Act, 1936, s. 269 (3), a person may not keep a movable dwelling on any one site for more than forty-two consecutive days or sixty days in any twelve consecutive months unless such an occupation is licensed. The Whittlesey Urban District Council has recently had cause to take action under this provision. Mrs. Freda Fox was summoned first on December 19, 1955, for keeping her caravan on the same site for longer than the permitted time without a licence and fined £2. Mrs. Fox did not remove the caravan and on February 20, 1956, was again summoned, fined £4 and ordered to pay instalments of 10s. a week. The fines were not paid and so on April 16, Mrs. Fox came before the Whittlesey magistrates once more. This time the defendant was committed to prison for one month, the sentence being suspended so long as she paid 5s. a week.

There is nothing in the section authorising the removal of a dwelling by the local authority, but in most cases the maximum fine of 40s. a day for each day on which an offence continues after conviction would ensure fairly prompt action by the offender.

### Newly cooked provisions

Under Schedule 2 of the Shops Act, 1950, sales of newly cooked provisions to be consumed off the premises are exempted from prohibitions against sales after closing hours. In *London County Council* v. *Davis* [1938] 2 All E.R. 764 it was held that newly baked bread sold in a shop fell within this exemption. Recently in Scotland in *Lanark County Council* v. *Dalziel,* 1956 S.L.T. (Sh.Ct.) 30, the question arose whether the exemption extended to rolls sold from a van after shop-closing hours. The rolls were still warm when they were sold, having been removed from the oven only a half an hour earlier. The Sheriff-Substitute held that the exemption covers provisions cooked in one place and brought to another for sale so long as when sold they are newly cooked and that, therefore, no offence had been committed in the circumstances.

### Parliament

#### *Prisons*

On the night of April 2–3, 1956, 2,391 prisoners slept three in a cell. Of these, 330 were at Manchester, 219 at Birmingham, 333 at Pentonville and 246 at Wandsworth prisons. Last year the total was 2,866 (H.C. Debates, Vol. 551, col. 383; April 12, 1956).

At present prisoners in local prisons may earn 10d. per week in the first eight weeks of their sentence. After that earnings may be on a flat rate or a piece rate. The average amount earned weekly by flat rate workers is 2s. 6d. and by piece-rate workers about 2s. 9d. (Vol. 551, col. 384; April 12, 1956). A scheme has been prepared for improving the present system of prisoners' earnings which will, it is hoped, have the effect of increasing output. It will be put into effect as soon as financial considerations permit. The hours worked by men prisoners vary from one local prison to another and range generally between 23 and 28 hours weekly. Increasing working hours is mainly a matter of getting more staff for supervision (Vol. 551, col. 1946; April 26, 1956).

During 1955 the number of men prison officers increased by forty-two and the number of women officers decreased by twenty-five. It is estimated that it would require an additional 1,000 men beyond the present establishment to extend the three-shift system to all men's prisons, but such an extension has not been authorised and may indeed not be practicable. At the moment the present establishment is about 200 below strength (Vol. 551, col. 382; April 12, 1956).

Articles manufactured in prison workshops are not normally sold to the public, but to Government Departments. Where they are sold to the public, the price is fixed so that it will not undercut prices charged for similar articles by outside manufacturers. Where they are sold to Government Departments, it is sought to ensure that the costs added to the cost of manufacture bear some relation to costs outside (Vol. 551, col. 1943; April 26, 1956).

### *Straffen*

Local residents are much concerned at the transfer of John Straffen to Horfield prison at Bristol. It was necessary to move Straffen from Wandsworth because it was reported that certain prisoners were planning to escape and to take Straffen with them to create a diversion. Bristol prison is as suitable as any other for the detention of Straffen and he will be kept in the strictest security. Known escapists were transferred from the Bristol prison before Straffen arrived. The Home Secretary will bear in mind the need for a special institution for such persons as Straffen (Vol. 551, col. 1162; April 19, 1956).

### *Mancini trial*

Mancini was convicted of murder and hanged in 1942. Mancini's solicitor has made an affidavit to the effect that the Crown made a private offer to Mancini's defence counsel to reduce the charge to one of manslaughter. The judge was consulted but he considered it would not be right for the prosecution to accept a plea of guilty to manslaughter. These facts were subsequently stated to the then Home Secretary, but he did not consider they afforded sufficient grounds for recommending the exercise of the Royal Prerogative. The present Home Secretary does not think that this is inconsistent with the practice of recommending a reprieve if there is any doubt as to the prisoner's guilt (Vol. 551, col. *96* ; April 19, 1956).

### *Air-guns and pistols*

The existing law concerning the supply and use of air-guns and air-pistols, which prohibits the purchase or hire of air weapons by persons under seventeen, but imposes no other restrictions on their possession or use, is based on a report submitted in 1934 by a Departmental Committee. The Home Secretary sees no reason to depart from the policy recommended by the Committee, but is causing further inquiries to be made (Vol. 551, col. *25* ; April 12, 1956).

### *Highways*

The use of recorders and other broadcasting mediums by street vendors to advertise their wares is a nuisance in many areas, and many county and borough councils have made by-laws dealing with their use in streets and public places. There are no regulations or by-laws relating specifically to mobile shops which cause obstruction or endanger the lives of customers, but such shops are subject to the general law relating to the obstruction of the highway (Vol. 551, col. *25* ; April 12, 1956).

> *"I think you may take it that the facilities at Wormwood Scrubs do not include provision for the forging of documents"* : *per* LLOYD-JACOB J.

*Subscribers and others are invited to submit for publication articles and letters on matters of interest within the scope of this Review. They should be sent to the* EDITOR, *Criminal Law Review,* 3 CHANCERY LANE, LONDON, W.C.2. *Every effort will be made to return drafts or unsuitable copy but no guarantee can be given in this respect.*

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# *Murder by Mistake*

By S. PREVEZER, M.A.
*Lecturer in Law at University College, London, Solicitor (Hons.)*

"The meaning of 'malice aforethought,' which is the distinguishing criterion of murder, is certainly not beyond the range of controversy," stated the Report of the Royal Commission on Capital Punishment in September, 1953. According to the Commission, five forms of murder were "commonly accepted," the first three involving an intent to kill, the fourth, an intent to cause grievous bodily harm, and the fifth, knowledge by the accused that his act was likely to kill or cause grievous bodily harm. The Commission "did not share the view" that actual knowledge by the accused was unnecessary: "Under the existing law as stated by Stephen, the question the jury have to consider is whether the accused knew or was aware of the likely consequences of his act; and we think that the law is sound."

In January of this year, in *R.* v. *Ward* [1956] 1 Q.B. 351; [1956] Crim.L.R. 203 the Court of Criminal Appeal approved the following direction: "If when the prisoner did the act he must as a reasonable man have contemplated that death or grievous bodily harm was likely to result, he was guilty of murder." The summing-up, said Lord Goddard C.J., was "unimpeachable." To his own knowledge, it had been given in scores of cases and "was eminently fair and correct." This form of murder is not, however, one of the five said to be commonly accepted, and runs contrary not merely to the Commission's view that personal knowledge is necessary but also, it would seem, to general principles. The decision is of considerable importance and a closer examination of the Commission's fourth and fifth forms of murder would appear advisable.

### *Intent to cause grievous bodily harm*

It has long been accepted that, in the context of murder (though not of *attempted* murder—*R.* v. *Whybrow* (1951) 35 Cr.App.R. 141), there is no difference "between the direct intention to kill and the intention to do some great bodily harm short of death" (4th Report of the Commission on Criminal Law (1839)). Thus it was normal in 1838 to direct a jury that "if . . . the prisoners really intended to do any serious injury to the deceased, although not to kill him, it was murder" (*R.* v. *Errington* (1838) 2 Lew. 217). The actual degree of harm intended which constitutes "great," "serious" or (more usually) "grievous," bodily harm is uncertain. It would seem that it should be such injury as endangers, and is known by the accused to endanger, the life of his victim; "at least terrible injury" appears to have been accepted by Devlin J. in a recent case (see *R.* v. *Thomas* [1949] 2 All E.R. 662 at 670; and 15 *Modern Law Review*, pp. 345–346). The accused's knowledge must be relevant: if he knows that his victim suffers from a weak heart, he may intend grievous bodily harm by a light blow. If he believes him to be extremely hardy, even a severe blow might not suffice.

On the other hand, it has been held by Willes J., on an indictment for shooting with intent to do grievous bodily harm (now s. 18, Offences against the Person Act, 1861) that it was not necessary that the harm should be either permanent or dangerous. It need only be such "as seriously to interfere with comfort or health" (*R.* v. *Ashman* (1858) 1 F. & F. 88). There is, therefore, the danger that a judge may employ the direction in *Ashman* which is appropriate, if at all, to the statutory offence where death does not occur, when directing a jury on the intent in murder where death does occur. This was done by Hallett J. in *R.* v. *Bloom* (1952) *The Times*, February 7, though the jury still returned a verdict of manslaughter. "Murder by pin prick," said Mr. Justice Devlin of this form of killing, "is not a legal impossibility" ([1954] Crim.L.R. 669). Furthermore, under the present law, a person convicted of a felonious assault under section 18 on such a direction will almost automatically be convicted of murder (under the *constructive* malice "felony of violence" rule) if his victim dies within a year from the assault, even though the harm he intended amounted to nothing like "terrible injury."

Though "commonly accepted," even this form of murder is not without its critics. The argument against it has been best put by Mr. Justice Devlin ([1954] Crim.L.R. 661 at 670) and, naturally enough, derives much of its force from the retention of the death penalty for murder.

### *Realisation of the likelihood of death or grievous bodily harm*

Just as the 1839 Report drew no distinction between the intent to kill and the intent to cause great bodily harm, it drew none between the intent to kill and the wilful "doing of an act of which death is the probable consequence. According to the well-established judicial rule, everyone must be presumed to contemplate the probable consequence of his own act." Today, however, the presumption, which is sometimes worded differently, is accepted to be one of fact and rebuttable by the accused. As Denning L.J. said of it recently in a different context: "There is no 'must' about it; it is only 'may.' The presumption of intention (or contemplation) is not a proposition of law but a proposition of ordinary good sense" (*Hosegood* v. *Hosegood* [1950] W.N. 218 at 219). Lord Goddard himself illustrated this in *R.* v. *Steane* [1947] K.B. 997 at 1004 by an imaginary case: "A man is charged with wounding with intent to do grievous bodily harm. It is proved that he did severely wound the prosecutor. Nevertheless, unless the Crown can prove that the intent was to do the prosecutor grievous bodily harm, he cannot be convicted of that felony. It is always open to the jury to negative by their verdict the intent. . . ."

Applying this reasoning to the law of murder, the Royal Commission stated in 1953 that it would "prefer to limit murder to cases where the act by which death is caused is intended to kill or endanger life" but that in practice a person would "*seldom, if ever,*" except in cases of constructive malice, be convicted of murder" unless there was evidence that he had wilfully put life in jeopardy." Just how unrealistic was the Commission's view can be shown by the facts of *R.* v. *Ward* [1956] 1 Q.B. 351.

Ward, who was proved to be of sub-normal intelligence and suffering at the time of the incident from stomach ulcers, was alone with the small child of the woman with whom he was living. The child's continual crying threw him into a violent temper and he shook it, intending, according to his evidence, to quieten it but not to hurt or kill it. It died from the shaking and he was convicted of murder on a direction which ignored his state of mind. If a reasonable man in his position would have foreseen the likelihood of death or grievous bodily harm, that was murder. Ward's appeal against this direction on the grounds, in fact, that negligence was not a form of malice aforethought, was emphatically dismissed by the Court of Criminal Appeal in a short judgment delivered by the Lord Chief Justice.

### *Who is a reasonable man?*

It was clear from authority *before* the decision of the Court of Criminal Appeal in *Ward* that had Ward intended to kill the child or cause it grievous bodily harm he could not have successfully pleaded provocation. Recent cases have clearly affirmed that the test of the reasonable man must be applied when a plea of provocation is raised. Just as a reasonable man is neither drunk (*R.* v. *McCarthy* [1954] Crim.L.R. 549), excitable (*Mancini* v. *D. P. P.* [1942] A.C. 1), nor impotent (*Bedder* v. *D. P. P.* [1954]

Crim.L.R. 721), one would not have thought that he suffered from stomach ulcers or sub-normal intelligence, nor that he would be so violently provoked by a child's crying.

In *Ward,* however, Lord Goddard, for the purposes of ascertaining what *should* have been foreseen by the accused, defined (any) reasonable person as one "*who cannot set up a plea of insanity*" ([1956] 1 Q.B. at 356). This would appear, with respect, to be too wide: it conflicts with the traditional view in provocation of the reasonable man and would, if applied generally in the law of murder, lead to most curious results. Excluding only those persons who can plead the McNaghten rules, it ranges from the most perceptive, endowed with extraordinary foresight and restraint to the most stupid who may be "passion's slaves" but who have sufficient understanding to know what they are doing and whether it is lawful. Difficult as they may be to find in fact, the tort man on the Clapham omnibus and his American lawn-mowing friend at least possess certain recognisable features—average beings, they are neither very clever nor very stupid, neither very passionate nor very cold, neither very perceptive nor very short-sighted, and so forth. But if the only unreasonable man is he who can plead insanity, then a reasonable man may possess any quality save that of knowing either what he is doing or whether it is lawful. He may be drunk, excitable or impotent—or even be of sub-normal intelligence and suffering from stomach ulcers. There is virtually nothing he would not foresee if he is one of the most acute of those persons who cannot plead insanity. Ward himself was *a* reasonable man although the consequences of his acts could have been foreseen by a more perceptive person unable to plead insanity.

But what is lost on the swings is made up on the roundabouts for, applying this definition of a reasonable man to the defence of provocation, there is virtually nothing that would not provoke him if he is one of the most foolhardy and hot-blooded of those persons who cannot plead insanity, not even a child's crying; Ward would have been better advised to have admitted some degree of guilt and pleaded not lack of foresight but provocation. This is clearly contrary to authority and one must conclude either that Lord Goddard's definition should be confined to the question of foresight, which is illogical and would weigh too heavily against the accused, or that it was merely an ill-considered aside (which, in fact, was set in parenthesis in the *All England Reports* and not mentioned at all in the *Weekly Law Reports*) which conflicts with recent decisions of the House of Lords and is wrong.[1]

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[1] These words appear in the *Law Reports* in a judgment revised by Lord Goddard.

*Authority for the reasonable foresight view*

The *All England Reports* contain an editorial note at [1956] 1 All E.R. 565 that the objective direction in *Ward* accords with that of Avory J. in *R.* v. *Lumley* (1911) 22 Cox C.C. 635 and that the relevant propositions were stated by Humphreys J. in *R.* v. *Larkin* [1943] 1 All E.R. 217 at 219; both cases, apparently, were cited in argument before the Court of Criminal Appeal in *Ward.*

The direction in *Ward* does indeed accord with that of Avory J. in *Lumley* and also with those of Bigham J. in *R.* v. *Whitmarsh* (1898) 62 J.P. 711 and of Lawrence J. in *R.* v. *Bottomley* (1903) 115 L.T. 88. These were all, however, cases of fatal abortions and the directions were, in each instance, notable for avoiding the much harsher constructive malice rule, then obtaining, that death resulting from any felony was murder. Each direction was in fact comparatively favourable to the accused as was that of Stephen J. in *R.* v. *Serné and Goldfinch* (1887) 16 Cox 311. In that case, in which substantially similar words were used, the learned judge was also seeking to evade the constructive malice rule (see further *The Modern Approach to Criminal Law* (1948), pp. 251–254). Counsel for Ward, in fact, argued that the direction in *Lumley* was appropriate only in cases of constructive malice, though this would, with respect, seem unconvincing, as the question of foresight is then irrelevant (see *D. P. P.* v. *Beard* [1920] A.C. 479 at 504, *per* Lord Birkenhead L.C.): " in *Beard's* case it was only necessary to prove that the violent act causing death was done in furtherance of the felony of rape ").

The passage from the judgment of Humphreys J. in *Larkin* referred to in the editorial note appears to be no authority for *Ward,* for there the learned judge gave his views, not on actual malice aforethought but on constructive malice, equating death resulting from a felony (which, in any event, may be too wide for constructive malice today), with death resulting from an act *intended* to cause grievous bodily harm: " If, in doing that dangerous and unlawful act [which would be manslaughter] he is doing an act which amounts to a felony he is guilty of murder, and he is equally guilty of murder if he does the act with the intention of causing grievous bodily harm. . . . " Indeed it appears from the *Law Report* of *Ward* [1956] 1 Q.B. at 354 that the statements of Humphreys J. were relied upon, as one might have expected, by counsel for the *appellant.* There is no mention in either the report in the *Law Reports* or the *All England Reports* that it was argued that Ward committed a felonious assault on the child under section 18 and was guilty of constructive malice, and in fact the contrary is implied in the *Law Reports* at p. 354. The judgment of Lord Goddard, as reported, is based on the fact that Ward had sufficient *actual* malice if he deliberately did acts from which a reasonable man might foresee the likelihood of death or grievous bodily harm, though his counsel did admittedly argue that this would be extending the doctrine of constructive malice.

Despite the statement of counsel that there was no reported case upholding the reasonable man test of foresight, it seems clear that there was in fact no lack of authority for either the subjective or objective views of malice aforethought. The pity is that the court adopted that which conformed less to general principles and resulted in the unedifying spectacle of the Court of Criminal Appeal firmly establishing a principle of law knowing that the only persons condemned to death by virtue of it would probably be reprieved by the Home Secretary, as in fact happened to Ward.

Those decisions, many of them probably unreported, in which the objective direction upheld in *Ward* was used, spring, it is submitted, from a confusion of law and evidence, though this never appears to have formed the grounds of an appeal until *Ward*, perhaps because of the provisions of section 4 (1) of the Criminal Appeal Act, 1907. In *R.* v. *Rymell* [1954] Crim.L.R. 60, though the appeal was partially upheld on the question of causation, the judgment of the Court of Criminal Appeal, delivered by Lord Goddard, stated that "if the accused had been guilty of actions calculated in the mind of a reasonable man to cause grievous bodily harm and death resulted, he would be guilty of murder." The facts were similar to those in *Ward*: a widower, with four small children, was maddened by the crying of his two year old son and struck him in the face. He had apparently been a devoted father and was at the time under the influence of drink. The child died, Rymell was convicted of murder and, on a misdirection on causation (which should, perhaps, have resulted in a complete acquittal), a verdict of manslaughter was substituted and Rymell sentenced to seven years' imprisonment. In the direction by Lord Goddard in *R.* v. *Craig and Bentley* (1952) *The Times*, December 12, one finds the statement "that if a person does an act towards another wilfully, that is to say intentionally, which a reasonable man would know may cause death or grievous bodily harm, and death results, that is murder." It would appear that this was said from excess of caution for there was, on the facts, clear evidence of an intent to kill. There is support for the direction in *Ward*, not merely in *Rymell* and *Craig and Bentley* but also, for example, in the views of Lord Birkenhead in *D. P. P.* v. *Beard* [1920] A.C. 479 at 504 which distinguish between the intent to kill and the realisation of the likelihood of serious injury. Holding that drunkenness might negative the former but not the latter, he refuted what might appear to some to have been the very proper opinion of the Court of Criminal Appeal in *R.* v. *Meade* [1909] 1 K.B. 895 at 899 that drunkenness might prevent the commission of murder by showing that the accused "was incapable of knowing that what he was doing was dangerous, *i.e.*, likely to inflict serious injury." It is this reasoning of Lord Birkenhead's (which is inconsistent with his own subsequent statement that drunkenness may operate as a defence to crimes other than those requiring a specific intent), which has found favour, unwittingly perhaps, with the Court of Criminal Appeal in *R.* v. *Ward*.

On the other hand, there is plenty of authority for the view that the accused must foresee the likelihood of death or grievous bodily harm. In *R.* v. *Horsey* (1862) 3 F. & F. 287 at 288n., Baron Bramwell directed the jury that "though the general intent may be inferred from that degree of recklessness of human life which implies malice in law, that requires a consciousness that the natural and probable result of the act will be to cause the death of a human being." Later in the same year, in *R.* v. *Vamplew* (1862) 3 F. & F. 520 at 522, Chief Baron Pollock stated: "The crimes of murder and manslaughter are, in some instances, very difficult of distinction. The distinction which seems most reasonable consists in the consciousness that the act done was one which would be likely to cause death. No one, however, could commit murder without that consciousness." More recently, in *R.* v. *Lenchitsky* [1954] Crim.L.R. 216 the direction (approved by the Court of Criminal Appeal!) contained the statement that if the jury "were satisfied that owing to his feeble-mindedness he was incapable of forming an intention to do grievous bodily harm, they must find him guilty of manslaughter." Only a month before *Ward,* in *R.* v. *Bancroft* (1955) reported in *The Manchester Guardian,* December 2, Ashworth J. directed the jury that it had to be satisfied before convicting the accused of murder that he intended to kill or cause grievous bodily harm, adding: "It is enough for him, if you are not satisfied that it was his intention to cause grievous bodily harm." Today one might argue that the important question in *Lenchitsky* and *Bancroft* should have been not what was the accused's intention but what would the reasonable man have foreseen. If *Beard* and *Ward* are correct on this point, the prosecution would be better advised to ignore the question of intention and concentrate on that of foresight. The only, and illogical, way to reconcile them with *Lenchitsky* and *Bancroft* is to say that the test of intention is subjective, but that of foresight is objective.

### *Effect of Ward*

The effect of Lord Goddard's vindication in *Ward* of the objective test of malice aforethought is that it seems to obscure the line which in criminal law *must* clearly be drawn between law and evidence. There is a vital difference, as Lord Goddard has himself recognised on other occasions, between deliberately doing an act knowing the consequences, and deliberately doing an act in circumstances which raise a presumption that one knows the consequences. The presumption may be rebutted by proof of the operation of such factors as stupidity, drunkenness or thoughtlessness. Are law and evidence so confused as to entitle the Lord Chief Justice to testify to the 1953 Commission that he would direct a jury to the effect that anyone who inflicts grievous bodily harm *must* know that he is likely to cause death? Was this so in *Ward*? Yet in *Wilson* v. *Inyang* [1951] 2 K.B. 799 it was Lord Goddard himself who insisted that reasonableness was a question of evidence for the jury which might assist them in deciding whether or not the accused was honestly mistaken and therefore lacked *mens rea*. This reasoning is now inapplicable to the law of murder; presumably the objective test must apply, too, to determining when one is entitled to kill or cause grievous bodily harm in defending person or property. That there was at one time confusion, in this point as well, of law and evidence emerges, for example, from the decision of Lopes J. in *R.* v. *Rose* (1884) 15 Cox 540, but this had been thought by some to be weakened by the reasoning in *Wilson* v. *Inyang* (see, *e.g.*, Turner and Armitage, *Cases on Criminal Law*, at p. 101, n. 2). Now, probably, we are back where we started.

Stated in another way, the importance of *Ward* lies in its effect on the defences of mistake and drunkenness. When the prosecution is required, as is generally the case, to prove the presence of *mens rea*, whether in the form of a specific intent, or of foresight of consequences or knowledge of certain facts, such factors as mistake or drunkenness are admissible in evidence on behalf of the accused to prove its absence. Drunkenness may deprive him of the intention, and either drunkenness or mistake of the foresight or knowledge. In crimes of strict responsibility or absolute prohibition, on the other hand, mistake or drunkenness can generally only operate to mitigate punishment. Between these two extremes, lies the possibility of liability for negligence, adopted in *Ward*, when the accused is punished for failing to act reasonably. Here mistake and drunkenness are usually no defence unless it can be shown that the mistake, whether or not due to drunkenness, was reasonable in the circumstances.

It was the practice not so long ago for textbooks to state on one page that, except in a few crimes such as manslaughter, criminal liability was not founded on negligence, and, then, inconsistently, to state, on another, that for mistake to be a defence it had to be reasonable. Today the inconsistency is more often recognised by writers than judges, despite such cases as *Wilson* v. *Inyang* and *Davies, Turner & Co. Ltd.* v. *Brodie* [1955] Crim.L.R. 42. To the list of crimes which can be committed by negligence, and to which drunkenness and mistake are usually no defence, must be added the most practically important of all.

For better or worse, *Ward* is a binding decision on the question of foresight in murder and establishes that negligence is a form of malice aforethought. The prosecution's task has been simplified at the cost of sentencing to death persons who have killed by failing to show the foresight of reasonable men. "The law of murder," wrote Dr. Glanville Williams (65 *Law Quarterly Review* at p. 498), "should be reserved for the grosser cases of homicide, and in all cases of doubt it is better to leave the offence to be dealt with under the law of manslaughter with its flexible punishment." The Court of Criminal Appeal should, it is submitted, have observed this view and the words of Mr. J. W. C. Turner (*The Modern Approach*, at p. 230) that "careful deliberation is needed before the step is taken of abandoning the subjective test of liability in . . . murder . . . and the change, if it is to be made, should be made by the legislature in clear and unambiguous terms."

# Dating Documents

By WILSON R. HARRISON, M.SC., PH.D.

*Director of the Home Office Forensic Science Laboratory, Cardiff*

"We have reason to believe that a document which purports to be about two years old has actually been written much more recently. Can you determine whether this is so or whether all the entries on it were made at the same time?"

This is a common request because documents may so easily be fabricated or their significance altered by the addition of a few words or figures. It is by no means easy for anyone faced with a problem of this kind to obtain any real assistance from the literature on document examination for this is not only scanty and scattered in many publications, but much of what has been written is misleading if not inaccurate.

Whilst it is impracticable, within the confines of a short article, to deal in any great detail with the very wide subject of the dating of documents or of the entries on documents, it is hoped to say what can generally be done in the present state of knowledge and to indicate what problems are still incapable of solution.

Dating problems fall into one of two categories. The first is the determination of absolute age, generally encountered when a whole document is in question, whilst the second is the demonstration of the relative ages of entries, a question which arises when it is suspected that the whole of the document has not been written or typed at one time.

In some cases the problem is simplified because all that may be needed is the demonstration of the greatest age a document can have, because the majority of fraudulent documents are prepared at dates much later than those they may bear.

### Determination of maximum age

Investigations to this end are directed to, first, the materials of which the document is composed and, secondly, the design and condition of the written or typed matter thereon.

*Paper*

With the majority of contemporary documents little can be learned from the paper. In the past, paper was made in comparatively small quantities, a large proportion of it was watermarked and fairly extensive changes in materials and methods of manufacture took place during the latter half of the last century. Whilst the palaeographer can often find much of evidential value by analysing the paper of any document with which he is concerned, the position is different with contemporary documents, for nowadays paper is made in enormous quantities with its composition and other properties maintained as constant as skill and care can ensure.

Most modern paper bears no watermark and even when it does, it is often a most difficult task to ascertain the maker, for this problem is complicated by certain unscrupulous manufacturers imitating the watermarks of famous firms.

Even when the paper maker can be traced, it will generally be found that the particular sheet concerned might very well have been manufactured at any time over a wide period of years. Very occasionally, defects in the machinery cause a small quantity of paper to be produced with a defective watermark. Osborn, in his "Questioned Documents," cites a case where this led to the proof that a will was fraudulent because the records of the papermaker enabled a limit of age to be given to the paper on which the will was drawn up.

### *Bound books*

If a document is in the form of an account book, inquiry should be made of the stationers responsible for its production. The author has had a recent case where a set of account books had been fraudulently prepared in a hurry to meet an official investigation into the affairs of a firm. The entries in these books purported to go back a number of years, but the stationers who had bound the books were able to show that that particular style of binding was first introduced on to the market some months after the dates given to some of the earlier entries.

### *Printed matter*

Printed letter headings are subject to modification from time to time even if no new information such as addresses or changes in telephone numbers has to be included, for it is sometimes necessary to prepare new blocks from which the headings are to be printed. The use of a different block may result in no apparent change in the design of the heading, but on closer scrutiny some differences invariably become apparent, to the discomfiture of any forger who has used paper which could not have been printed at the date given to the forged document.

An example of this occurred in a charge of perjury heard at the Central Criminal Court recently. The forgery of a back-dated letter was exposed when it was proved that a significant period of time separated the date given on a letter specially prepared to support a civil claim and the subsequent date of the first printing of the headed notepaper on which the letter was typed.

### *Typescript*

Any typescript should be submitted for expert examination because slight modifications in the design of type are introduced from time to time so that the discovery of but a single modified character might serve to give a limit of age and brand the document as a forgery. A typewritten document may have material added to it at a period long subsequent to the original typing. The principles which govern an investigation when this is suspected have already been outlined in the article on "Typewriting" [1954] Crim.L.R. 598.

### *Inks*

Writing inks can be divided into two classes, the first being the free-running inks used with conventional pens and in fountain pens, and the second the thick viscous inks found in the ball-point pen.

The free-running mobile inks are further divisible into two classes:—" Blue-black," consisting of an aqueous solution of the iron salts of what may be termed gallotannic acid initially coloured with a dark blue dyestuff, and " Dyestuff inks " which are simply aqueous solutions of synthetic dyes which contain no iron.

### *Ball-point pen inks*

Ball-point pens first became popular in the mid nineteen-forties, but the original inks based on an olein solution of oil-soluble dyes were by no means entirely satisfactory. This led to their replacement in 1952 by greatly superior inks containing ethylene glycols associated with one or other of the dyes already successfully used in certain printing processes. These facts constitute valuable dating data, for it becomes a simple matter to give a limit of age to ball-point pen writing by determining which type of ink has been used.

Although much of the writing done with the original ball-point inks tended to fade very rapidly, a fault not shared with the modern inks, it is impossible to give a limit of age to writing done with a ball-point pen based on the extent of this fading. This is because the fading is governed largely by the conditions under which the document concerned has been kept, strong sunlight, heat and humidity having the greatest influence.

Not only did the early ball-point pen inks fade, but certain of them, particularly those containing the dye " Victoria Blue," were apt to " strike " very badly. " Striking " is the term given to the lateral spreading of the ink line which in extreme cases causes the writing to merge into a broad indecipherable blur. Most of the older ball-point pen inks tended to strike to an extent which could be gauged by examination of the ink line with a microscope. If a much later addition is made to such a writing the new ink line will exhibit, for a period, appreciably less striking than that shown by the original. Enlarged photographs will enable a record of any difference to be preserved. With a new entry, the ink will immediately begin to strike and diffuse laterally at a more rapid rate than is being shown by the edges of the older ink line because of the higher concentration of dye in the new line.

This results in the difference in appearance between the new and the older writing being steadily reduced until finally it will be impossible to demonstrate that there is any significant difference in the appearance of the two entries. This is an illustration of the importance of having any questioned document examined as soon as possible.

Unfortunately for the document examiner, modern ball-point pen inks do not show anything like the same degree of striking and lateral diffusion, so that new entries are usually indistinguishable from the old if the same ink has been used.[1]

### *Pen and ink writing*

With writing made with the more popular type of free-running ink—an aqueous solution of a synthetic dyestuff—the only observable change with age is a tendency to fade. Unlike ball-point pen inks, there is no tendency towards spreading or striking of the dye unless the document has been stored in an exceptionally humid atmosphere. This means that in the present state of knowledge one cannot obtain any estimate of the absolute age of such writing or even hazard a guess as to the relative ages of different entries made with this ink on the same document except in special circumstances.

Blue-black, the older and nowadays the less popular ink, but one with which all important documents should be written, exhibits an interesting series of colour changes as it ages. The clue to this behaviour lies in its iron content. The fresh ink, a practically colourless solution of ferrous gallotannate which has been coloured and so rendered suitable for use as ink by the addition of a blue dye, also contains acid which is responsible for its corrosive action on steel pen nibs. This acid retards the adsorption of oxygen from the air when the ink is in bulk so that it will remain in an open ink well for some time without appreciable change.

When the ink is applied to paper, its surface relative to its volume is increased to such an intent that the absorption of oxygen is facilitated. Should the paper contain filling or glazing materials which tend to neutralise the acid, the oxidation will be appreciably accelerated. As the ink becomes oxidised, the colourless soluble ferrous gallotannate is converted to black insoluble ferric gallotannate which masks the blue tint of the original ink.

It might be thought that this change in the colour of the ink line would afford a means of dating the writing, for normally the ink slowly darkens to reach its full black tone after an interval of about two years or so. After this, the ink remains fully black for a number of years before a slow, but inevitable, process of fading sets in which is due to the slow decomposition of both the dye and the ferric gallotannate, until finally only a faint yellow trace of ferric oxide remains.

If the ink is a good quality "record" ink, containing a sufficiently high concentration of iron salts, this final stage may be reached only after the lapse of centuries.

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[1] See further "The Ball-Point Pen" [1955] Crim.L.R. 544.

Unfortunately, experience has shown that it is quite impracticable to date an ink writing by virtue of its colour. The rate of oxidation of the ink, and hence the development of the colour, is altered by far too many factors. The rate of oxidation is controlled largely by the degree of acidity of the ink after it has soaked into the paper.

Many papers are slightly acid, due to the presence of alum added during manufacture. On an acid paper, the oxidation of the ink may be so retarded that the writing remains noticeably blue in tint for some years. On the other hand, any alkaline loading in the paper will neutralise the acidity of the ink whose oxidation will be so accelerated that the writing might be fully blackened in a matter of days.

Other substances accelerate the blackening of ink. One of these is saliva which contains a small concentration of a substance, wrongly reported in many books as an enzyme, which will cause the extremely rapid blackening of an iron ink. This fact is taken advantage of when saliva is used as a secret ink. The presence of saliva is very difficult to detect once it has dried on a matt-surfaced paper, but if the sheet is brushed over with a very dilute solution of a blue-black ink, the secret writing shows up at once. This is due to the local acceleration of the blackening of the ink by the saliva adsorbed in the paper.

Other factors such as light, temperature and humidity also play their part in modifying the rate at which blue-black ink darkens.

In spite of the difficulties mentioned above, in certain cases it is possible to obtain valuable evidence on the age of ink-writing by making observations not so much of the actual colour of the ink, but of its changes with time. It often happens that a document which purports to be several years old has to be fabricated at the last moment. If a blue-black ink is used, the initial bright blue tint exhibited by the new ink might arouse suspicion, but this blue tint of itself is no proof that the document has been but recently written. If, however, a record of the colour of the ink line is made as soon as possible with a Lovibond Tintometer and the document is then preserved under conditions which are similar to those in which it is alleged to have been kept since its assumed time of production, the colour measurements can be repeated at regular, closely spaced intervals of time to determine the extent of any change in colour over a short period. If the document is really as old as it is alleged to be, the colour of the ink should not change appreciably in a short time, so that any appreciable darkening will prove that the ink line had been written only a short time before the tests began.

Many forgers darken the ink by the addition of Indian ink.

Blue-black darkened in this way presents a peculiar appearance quite unlike that of ink which has darkened naturally, and once the presence of carbon from the Indian ink has been demonstrated there remains little doubt of what has happened.

Another device is to use one of the soluble black inks instead of the Indian ink. When the writing is fresh, this may appear satisfactory, but this happy state of affairs may not hold for very long. There is no known dye which of itself is sufficiently dark to make an effective black ink, so that the majority of soluble black inks contain dark blue dyes whose colours are corrected by the addition of mixtures of reds and yellows.

In a recent case in which the author was concerned, signatures on certain " manufactured " documents appeared to have been written with an ink with a fully developed black colour. Unfortunately for the forger, the civil case for which they had been prepared was postponed whilst a criminal prosecution for perjury was proceeded with. With the lapse of time, some of the red dye which was a constituent of the black ink used to " improve " the appearance of the forgeries diffused out of the ink line. The peculiar appearance of the red-edged signatures undoubtedly influenced the jury, who had to decide whether to believe the defendant's story of their origin or not.

If the forger takes the precaution of mixing saliva with his ink, he will undoubtedly achieve an abnormally rapid blackening of the ink at the risk of having a most unusual constituent found in the ink line should suspicion be aroused.

Occasionally, special circumstances may allow of valuable evidence concerning the relative times of writing of two ink entries being adduced irrespective of the nature of the inks. The best example of this is where ink lines from the two entries happen to intersect. If the second ink line is written within a few minutes of the first while the ink is still wet, then the ink of the two lines will blend perfectly. If, however, the first ink line has dried, there will be a partial spreading of the second line into the first, but the line of demarcation will be quite clear. If the ink of the first line has become thoroughly dry and oxidised, there will be little, if any, spreading of the edge of the second line at the point of intersection.

This means that microscopic examination of any intersections present will allow the truth of any statements concerning the relative times of writing of any intersecting entries to be checked in accordance with what has been stated above. This is the evidence which is usually brought forward where cheques have been " raised " from six to sixty or from eight to eighty pounds at some period subsequent to the original drawing of the cheques.

### *Creases and folds*

The microscopic examination of any ink line which crosses a crease or fold in the paper may yield evidence of some importance. If a document is folded across an ink line after the ink has dried, there will be no spread of the ink into the cracks which occur in the surface of the paper at the site of the fold, but if the writing is done after the folding there will often be observed some modification of the edge of the ink line where it has crossed the fold. This generally takes the form of a lateral spreading of the ink into the fold. Fraudulent additions to documents are often made after the document has been folded, so it is worth while investigating any places where ink crosses a fold if there is any suspicion that this has taken place.

If a ball-point pen is used it is possible to write across a fold without leaving any definite indications that this has been done after the folding, which is yet another reason for not allowing such implements to be used for preparing important documents.

When a blue-black ink oxidises, other changes besides that of colour take place. If water is spilled on to writing done with a dyestuff ink, then irrespective of its age, the dye will usually run and the writing become smudged. With a blue-black ink the case is different. Whilst with a freshly applied ink there will be a certain amount of running, a dried and fully blackened ink, in which the soluble ferrous salts have been replaced by insoluble ferric salts, will resist the action of the water and hold the dyestuff firmly bound to the paper so that there will be little, if any, immediate running of the ink or smudging of the writing.

If, instead of water, a dilute solution of a weak acid such as oxalic is used, this will dissolve the ferric salts and liberate some of the colour, which will then run and smudge the writing. Experiments have shown that, generally speaking, the older and consequently the more completely oxidised the ink has become, the slower is this action of the acid upon the ink line.

There are those who profess to be able to determine the absolute age of an ink line by this reaction, but their claims are not considered seriously because the resistance of an ink line to the action of dilute acid or, for that matter, any other reagent is, like the blackening, modified by so many factors that the result of such tests are quite unreliable.

On occasions this test might prove of some value if it is required to ascertain whether two or more entries in the same ink on the same document were written at substantially the same time or at widely separated intervals of time. If one of the entries has been made fairly recently and the other is in an older and fully hardened ink, then the test may yield unmistakable evidence when one of the entries smudges quickly whilst the other remains substantially unaffected. Once both writings have become fully hardened and oxidised, then although one may be a year or so older than the other, the test will not serve to differentiate between them, because both will resist the action of the reagent.

Any test applied to ink writing which involves the use of chemicals is bound to result in the destruction of part of the writing as well as in a risk of causing damage to the paper itself. This criticism applies with even greater force to another method which has been advocated as a means of determining the age of a blue-black ink writing.

In this, strips of paper bearing portions of the ink writing are cut from the document before being subjected to chemical treatment which has the effect of bleaching out the ink line and causing the sulphates or chlorides which are present in gallotannate inks to become visible as dark streaks. Sulphates and chlorides contribute nothing to ink as a writing fluid but owe their presence to the materials from which the ink has been made. When the ink is applied to the paper, the sulphates or chlorides soak into the paper in the neighbourhood of the ink line, but with the passage of time they tend to diffuse laterally from their original position.

The extent of this diffusion is governed by time but also by other factors of which temperature and humidity are the most important. In general, it may be said that the older the writing, the greater will be the extent of the diffusion. Those who advocate this test, maintain that from it a reasonably accurate estimate of the absolute age of the writing may be obtained, especially if the conditions of storage are known, and that in any event, the relative ages of two or more writings on the same document may be determined with some degree of certainty.

Whilst there is probably some truth in these claims, especially with regard to the determination of relative ages, the test has a number of disadvantages which seriously limit its applicability. Today only a minority of inks contain sulphates or chlorides, and the serious mutilation of the document involved in the cutting out of the strips would rule it out in many cases.

### *Pencil writing*

A pencil line consists of a layer of a mixture of graphite and clay fragments which are entangled in the surface fibres of the paper. The graphite neither soaks into the paper nor changes chemically with time, so that there is no known way in which the age of a pencil writing may be determined by the examination of the line.

With pencil entries in a book such as a diary, their outline tends to become blurred owing to the relative motion of the pages. If additions are made to old pencil entries in a diary, then it may sometimes be possible to show by means of enlarged photographs that the more recent entries have sharper outlines than the remainder of the writing.

It is only with really old documents that chemical analysis of the pencil, crayon or ink is likely to prove of much assistance, because although the dates of the introduction of the majority of the materials used are known, they occurred too many years ago to be any help in dating modern documents.

In a fairly recent case dealt with by the author, a map showing the location of a buried treasure was attributed to Capt. Kidd. This map had been carefully drawn up on parchment as the forgers had not made the common mistake of using paper made of chemical wood pulp, which was first used for paper making in the latter half of the last century. They did, however, make the serious mistake of using a red ink which analysis proved to contain eosin, a red dye first put on the market many years after Kidd had been hanged.

### *Stamps*

Any stamp a document bears should be the subject of careful scrutiny. Many fabricators of false documents know this, and do not make the obvious mistake made by one gentleman who used a wartime issue pale twopenny stamp on a carefully forged receipt which bore a date which was some years prior to 1939.

It is often a matter of some difficulty to obtain a stamp of an obsolete issue in a hurry, so that quite often it becomes necessary to remove a stamp of the required appearance from another document and reaffix it with gum on the forgery. Careful examination of the stamp will usually reveal what has been done.

Even if the stamp has the correct appearance, its presence may serve to unmask a forgery. At the time of writing, the lower denomination stamps have remained unaltered in design and colour for some time, but a few months ago the design of the crown which appears in the water mark was altered. This means that the appearance of such a stamp on a document bearing a date but a few months back, would be sufficient to brand it as a forgery.

From the foregoing, it will be seen that whilst many documents may be given a limit of age by the application of one or other of the tests outlined, there are many problems which still await solution. Some will probably never be solved in a satisfactory fashion, but work is steadily proceeding on these problems in many laboratories, and the competent document examiner does not hesitate to take advantage of any advances in analytical methods. Unfortunately at the same time the efforts of other inventors are making his task more difficult, a noticeable example of this being the introduction of the ball-point pen with all the extra problems it has brought in its train. This means that at no time can there be any complacency in the mind of the document examiner, whose aim is always to expose fraud and advance the truth.

# Taking a Dying Deposition

By A. E. Jones

It is not often that magistrates, their clerks and the police are called on to play their parts in the taking of what is commonly termed a " dying deposition," but which, in statutory language, is the statement of a person " dangerously ill and unlikely to recover." For this reason it may be helpful to analyse the procedure and the difficulties which arise in practice. When the occasion does present itself for the relevant law to be applied, there is often little time to search the textbooks for guidance. In any case, the standard works do not provide answers to a number of questions which circumstances may pose. Yet the deposition to be taken may, if it has to be tendered in evidence at a trial, be of literally vital importance. Should the proper procedure not have been followed, however, the deposition will probably not be receivable as evidence at all.

## *The usual procedure under section 4*

The first matter which will have to be decided is whether to act under section 4 of the Magistrates' Courts Act, 1952 (which derives from the Indictable Offences Act, 1848) or under section 41 (which replaces part of section 6 of the Criminal Law Amendment Act, 1867). If the witness in question is unable to attend court on account of some disease or injury, but is not regarded medically as " dangerously ill and unlikely to recover," only section 4 will apply to the case. This will mean that the usual procedure of examining justices will have to be followed. The magistrate or magistrates hearing the charge must attend wherever convenient to take the deposition (examining justices are not bound to sit in open court), the accused must be present and be given full opportunity to cross-examine the witness, and the latter must sign his deposition and then be bound over to give evidence at the court of trial. The deposition taken will be treated in exactly the same way as the other depositions in the case, and, by the terms of section 13 of the Criminal Justice Act, 1925, may be read as evidence at the court of trial provided that it was properly taken, and that the witness was either bound over conditionally, or is dead, insane, too ill to travel, or kept out of the way by the procurement of the accused.

There is nothing in law to prevent the adoption of the "examining justices" procedure when the proposed witness is "dangerously ill and unlikely to recover." The special procedure laid down in section 41 of the Magistrates' Courts Act offers, as regards the future use of the deposition taken, no practical advantages over the normal procedure of section 4—save only one. That one advantage may, however, prove of tremendous importance. If examining justices (whose functions may be discharged by one magistrate) die or are, for some other reason, unable to continue hearing the case, the depositions they have taken cease to have any evidential value, either in the magistrates' court or at the court of trial, unless they are read over to and verified by the respective witnesses before fresh examining justices. But, in the case of the dangerously ill witness, death may have made this impossible and he is quite likely to be a witness without whose evidence the prosecution cannot be continued. If, on the other hand, the requirements of section 41 have been complied with, the deposition may be used as evidence before examining justices, whether or not the magistrate who took it is one of them, and it will also have full evidential force at the court of trial—subject to certain conditions which will be dealt with later. There can never be complete certainty about human life and affairs, so it may well be decided that the one important advantage resulting from the special procedure more than compensates for the fact that it substitutes unfamiliar technicalities for the well-known ones appertaining to the jurisdiction of examining justices.

### *The special procedure under section 41*

By subsection 1 (*b*) of section 41 of the Magistrates' Courts Act the powers conferred in that section can be used if "it is not practicable for examining justices to take the evidence of the sick person in accordance with the provisions of this Act and the rules." The exact significance of "not practicable" in this context cannot be said to be entirely clear. In *R.* v. *Bros, ex p. Hardy* [1911] 1 K.B. 159 it was accepted by the High Court that it was

" not practicable " for a metropolitan magistrate to abandon his ordinary list in order to take a " dying deposition." This seems to bring " not practicable " nearer to " not expedient " than to " not possible." It would seem to follow from this case that business or personal reasons of examining justices would be recognised as making it " not practicable " for them to sit specially for a dangerously ill witness. But it cannot be assumed that in all cases where the " section 41 " procedure was thought to be expedient, it would necessarily be held that the normal procedure was impracticable. Awkward questions of impracticability would arise if, for example, only one of the examining justices was available to take the deposition of the dangerously ill witness; or if it was not quite certain that magistrates before whom the accused had already appeared would, in fact, continue hearing the case. Would such circumstances justify taking a " section 41 " deposition; or would it be held that it was still practicable—even though inconvenient—to act under section 4? In the absence of a decided case directly in point, it would be wise to play for safety and put up with any disorganisation of arrangements for magistrates' sittings which might result from adopting the " examining justices " procedure.

In a case where it is clearly " not practicable " to act under section 4 the justice who proposes to take a " section 41 " deposition must first be " satisfied on a representation made by a duly qualified medical practitioner " that the witness in question is " dangerously ill and unlikely to recover." Nothing in the Magistrates' Courts Act or Rules indicates how the doctor's " representation " is to be made, or whether it should be recorded. In practice, it will usually be the police who will first learn the doctor's opinion; they will pass it on to the clerk, and he will inform the magistrate. Something more direct than this seems desirable as a representation by a medical practitioner to the magistrate. It would be a wise precaution to take a short deposition from the doctor before examining the witness. The doctor will probably wish to give his opinion in the absence of his patient; but, even so, he may feel professional qualms over accepting the uncompromising words of the statute and asserting that the witness is " unlikely to recover." No High Court decision helps to answer the question whether any departure from this formula would invalidate the whole subsequent proceedings. In a case within the writer's experience the doctor put it—perhaps not very happily—that there was " quite a good chance " the patient would not recover and the magistrate was satisfied that he could safely proceed under section 41.

There is no requirement of law that the person against whom the deposition will be used should hear the "representations" as to the medical condition of the witness; but no magistrate could be criticised if he allowed both prosecution and defence to be present at the taking of any deposition from the doctor, and also allowed questions to be asked by both sides if so requested.

### *"Notice of intention" to take a deposition*

Rule 29 (1) of the Magistrates' Courts Rules, 1952, requires that the person against whom a "dying deposition" will be used shall be given "reasonable notice of the intention to take the deposition." In *R.* v. *Shurmer* (1886) 17 Q.B.D. 323 it was held that the "notice of intention" must be in writing; and, in spite of the fact that the accused in that case was, in fact, present at the taking of the deposition tendered in evidence, it was not admitted because he had been given only verbal notice of the intention to take it. No form of notice is prescribed by law. To give all necessary information it should recite the name of the person to be examined, his medical condition (using the words of the Act), the place and time of the proposed examination, the offence to which it will relate, and the name of the accused if a charge has been made.

Some uncertainty must exist as to what will be considered "reasonable notice" in view of the decision in *R.* v. *Harris* (1918) 82 J.P. 196. The circumstances of that case were that a deposition offered as evidence purported to have been taken under the Criminal Law Amendment Act, 1867 (the precursor of section 41 of the Magistrates' Courts Act), but no written notice of the intention to take it had been served on the defendant. The prosecution sought, therefore, to have it read to the jury on the ground that it complied with the requirements of the Indictable Offences Act. Before it could be admitted in this way as a deposition taken by examining justices proof had to be given that "the accused or his counsel or solicitor had full opportunity of cross-examining the witness." The defence contended that this requirement had not been fulfilled because the defendant had had only one hour's notice of the proposed proceedings, and had been taken to the place of examination straight from prison without an opportunity of obtaining the services of an advocate. In ruling against the prosecution Avory J. said: "In determining whether there was a full opportunity of cross-examining I must have regard to the time at which the prisoner was first apprised of the intention to take the evidence. It was only an hour . . . so, in my opinion, she had not full opportunity." Then the learned judge went on to comment: "I regret that those responsible did not take proper steps to make the deposition admissible. All that was required was to serve written notice on the prisoner." Yet a deposition taken under the Criminal Law Amendment Act, 1867, would not have been receivable in evidence under section 6 of the Act unless it was proved that the accused " or his counsel or attorney had, or might have had, if he had chosen to be present, full opportunity of cross-examining the deceased person who made the same."

It would seem from this that in deciding whether there has been " full opportunity of cross-examining " in the case of a " dying deposition " a less exacting standard may be applied than in the case of a deposition taken by examining justices. If this were not so the whole object of the special procedure would be frustrated in many instances. An accused is entitled to expect that the ordinary hearing of an indictable offence will not be arranged under emergency conditions. A " dying deposition," however, must, by reason of the physical state of the witness, often be taken at very short notice or not at all. The difficulty of giving what can be regarded as adequate notice of a sitting of examining justices may therefore, in practice, be the deciding factor, when weighing up whether or not to use the " section 41 " procedure. In *R.* v. *Harris* (above) Avory J. would clearly have been prepared to hold that one hour was " reasonable notice " of intention to take a " dying deposition." This view, it is true, is expressed in an *obiter dictum* but the opinion of this learned judge on matters of criminal procedure always commands special respect.

Section 7 of the Criminal Law Amendment Act, 1867, enacts that when a prisoner has received notice of intention to take a " dying deposition," " the judge or justice of the peace by whom the prisoner was committed, or the visiting justices of the prison in which he is confined, may, by order in writing, direct the gaoler having the custody of the prisoner to convey him to the place mentioned in the said notice. . . ." It would seem from this that, if the magistrate who proposes to take the deposition is not one of those before whom the defendant has appeared, the visiting justices of the prison will have to be asked to act under this section. To avoid the highly undesirable delay which might result from this, it would appear open to the magistrate taking the deposition to act under section 105 (1) (*a*) of the Magistrates' Courts Act. This authorises a magistrates' court to commit an accused to custody " to be brought before the court at the end of the period of remand *or at such earlier time as the court may require*." Form 110 in the Magistrates' Courts (Forms) Rules, 1952, is the one prescribed for use if the accused is to be brought before the court earlier than the remand date. Since " magistrates' court " means "any justice or justices of the peace acting under any enactment" (see section 124 (1) of the Magistrates' Courts Act) the form can be drawn to require the appearance of the prisoner before "the magistrates' court sitting at (wherever it is proposed to take the deposition)." The form may be signed by any justice acting for the same petty sessions area as the court (see section 124 (2) of the Magistrates' Courts Act). This will give a further opportunity of avoiding delay in bringing up the prisoner, if the magistrate who is to take the deposition is not immediately available but another justice is.

It will usually fall to the police to take the form to the prison and it will be convenient to entrust them at the same time with the "notice of intention" which has to be served on the accused.

### *The taking of the deposition*

When all the preliminary formalities have been duly observed the actual taking of a "dying deposition" presents no legal difficulty. But practical difficulties may well be encountered. The witness may be so weak that his voice hardly carries even to the clerk who, on what may be an improvised and shaky writing surface, is doing his best to write down a legible statement. Doctors and nurses will have to be given prior proximity to the sick bed, and, if there are several accused, each handcuffed to a warder, it may be impossible to ensure that all of them and any advocates who are present, will hear everything the witness says. The clerk may then have to repeat the words as he takes them down as well as reading over the deposition after cross-examination has been completed. There is actually no requirement in section 41 that the deposition shall be read over to the witness or that he shall sign it, but it would seem good practice to follow the normal procedure so far as possible—though it might happen that the witness would be too badly injured even to make his mark, let alone write his signature.

Rule 29 (2) of the Magistrates' Courts Rules, 1952, requires the justice to "sign the deposition and add to it a statement of his reason for taking it, the day when, and the place where, it was taken and the names of any persons present when it was taken." The statement of the magistrate's reason for taking the deposition can conveniently be included in the caption and cannot do better than follow the words of the Act; a printed form will be available in many courts. If the deposition has been taken in a hospital ward it may sometimes be a little difficult to decide what persons shall be listed as present. Not all those in the ward will have been "present" at the proceedings except on a rather strained interpretation of the word. Fortunately, it does not appear that an omission in the list of persons present would be fatal to the admissibility of the deposition, as other procedural defects have been held to be. In *R.* v. *May* (1891) *The Times,* December 7, Grantham J. allowed a " dying deposition " to be read in evidence although the name of the prisoner's husband had not been included in the statement of those present.

### *Use of the deposition*

By rule 29 (3) of the Magistrates' Courts Rules, 1952, the deposition and statement must be sent to the court of trial, if there has already been a committal and to the examining justices if a charge made has not reached that stage. Section 41 (2) of the 1952 Act makes the deposition admissible as evidence before examining justices if it would be so admissible at the court of trial by virtue of section 6 of the Criminal Law Amendment Act, 1867. That enactment permits such a deposition to be read in evidence if the person who made it is dead, or unlikely to be able to travel or give evidence; provided always that it purports to be signed by the justice who took it, that it is proved that, as mentioned before, the person against whom it is proposed to use it had reasonable notice of the intention to take it, and that he " or his counsel or attorney, had or might have had, if he had chosen to be present, full opportunity of cross-examining the deceased (sic) person who made the same."

Should no criminal proceedings have been commenced in which the deposition would be relevant, it is required by rule 29 (3) of the Magistrates' Courts Rules to be sent to the clerk of the peace for the county or borough in which it was taken. This last provision is necessary because section 41 applies " where a person appears . . . able and willing to give material information *relating to an indictable offence* or to any person accused of an indictable offence "; *i.e.*, it may be acted on before any person has actually been charged. A deposition which merely " relates to an indictable offence " will, however, be useless at a subsequent trial or before examining justices, unless the conditions prescribed in section 6 of the Criminal Law Amendment Act, 1867 (see above) have been fulfilled.

The wording of section 41 of the Magistrates' Courts Act and of section 6 of the Act of 1867 makes it quite clear that the " dying deposition " procedure may be employed for the benefit of the accused as well as the prosecution. It would be a magistrate's duty to act under section 41 in respect of a defence witness if the occasion arose. Unless examining justices had reached the stage of giving the statutory caution to the defendant it would obviously not be " practicable " for them to take a deposition from such a witness in the normal way. Although the powers conferred by section 41 are, in practice, resorted to almost always in connection with some alleged crime of violence, it was emphasised in *R.* v. *Bros, ex p. Hardy* (above) that they apply to any indictable offence. Thus, it would be possible to take a " dying deposition " from an injured person in a dangerous driving case (assuming that there had been no decision to proceed summarily) and, if he afterwards died, the deposition could be tendered in evidence on a manslaughter charge, either for or against the driver.

The technical pitfalls that lie in the path of a magistrate and clerk acting under section 41 inevitably raise the question whether a defect in applying the prescribed procedure would prevent the deposition taken being received in evidence if it otherwise complied with the requirements of section 13 of the Criminal Justice Act, 1925 (the provision under which a deposition taken by examining justices may be read at the court of trial). Some textbooks quote *R.* v. *Katz* (1900) 64 J.P. 807 as an authority for the proposition that the deposition would be admissible in such circumstances; but it must be observed that counsel for the prosecution in that case expressly stated that two sets of depositions were available—one taken under the Criminal Law Amendment Act, 1867, and the other under the Indictable Offences Act, 1848. The prosecution wished to test the propriety of proceeding under the earlier Act and the learned judge's ruling related only to the set taken under that Act. In *R.* v. *Harris* (above), however, where notice of intention to take a " dying deposition " had been oral only, Avory J. did not refuse to consider receiving the deposition in evidence as one taken in accordance with the provisions of the Indictable Offences Act. He decided against its admissibility as such only because, as already stated, he held that the accused had not had full opportunity to cross-examine. A " dying deposition " which, on account of technical deficiencies, could not be read in evidence under the provisions either of section 6 of the Act of 1867 or of section 13 of the Criminal Justice Act, 1925, might sometimes be admissible as a dying declaration—but only if the charge were murder or manslaughter, and it could be established that the witness believed unreservedly that he would not recover.

In spite of all the technicalities involved it still seems preferable, for a number of reasons, to act, if possible, under section 41 rather than section 4 of the Magistrates' Courts Act whenever there is any urgency on account of the nature of a witness's illness or injuries. Once the difficulties of the procedure have been mastered a document will have been brought into existence which circumstances may make an irreplaceable, and, at the same time, essential piece of evidence. To avoid being caught entirely unprepared for the rare occasion when this emergency action has to be taken, the wise magistrates' clerk will have always ready for immediate use a folder containing all necessary forms and instructions.

# Juvenile Courts in the Federal Republic of Germany

By Gordon Adlam

I was invited by Herrn Amtsgerichtsrat Buchholtz, the stipendiary magistrate of a fairly wide district having its centre in this small village, Bergen, to attend a special juvenile court (Schoeffenjugendgerichtshof) sitting in camera—all juvenile courts are held in camera. A " Schoeffengerichtshof " is a cross between a jury and a lay magistrate system. The members (Schoeffen) are proposed by the various parishes, vetted by the district council and finally selected for a period of two years by a committee of the district council composed of the mayors of the more important parishes and the stipendiary magistrate. This particular local court requires four such persons, whom I shall call lay magistrates, plus two deputies in case of sickness. The special court normally meets once or twice a month, and, when it assembles, two lay magistrates, of whom in juvenile cases one must be a woman, sit on the bench with the stipendiary magistrate. The lay magistrates have exactly the same powers as the stipendiary magistrate and join with him in deciding questions of fact, law and type of sentence and interrogation of witnesses. They have the power to overrule the stipendiary magistrate. Whether a case shall be tried by the special court depends upon the nature of the offence—all sexual offences committed by juveniles are so triable—and the accused has no election at all as to the type of court by which he should be tried, although the state prosecutor can require a special court for a minor offence where the evidence is complicated.

An eighteen-year-old boy was charged here before the court sitting on January 19, 1956, with exhibitionism on October 19, 1955. Since the court was sitting in camera the only persons present were: the state prosecutor, a man and woman lay magistrates, Herr Buchholtz, the court clerk and learner clerk, a young male probation officer, the accused youth, both parents (the parents are compelled to attend and non-attendance is regarded in the same light as non-attendance of witnesses—contempt of court—punishable with a maximum fine of £84 8s. 4d.), the court janitor and myself. The state prosecutor, Herr Buchholtz and the court clerk wore simple black gowns.

Herr Buchholtz read out the charge. There is no plea of guilty or not guilty and even if the accused admits the offence it is nevertheless investigated. Herr Buchholtz told the youth to stand up and tell his story, warning him that it would be to his advantage to tell the truth even if he cut a sorry figure thereby. Although the defence was that the youth had been merely excreting, Herr Buchholtz nevertheless stated that the youth had previously appeared before him and had been found guilty of similar exhibitionism. The youth told his story but was asked to elaborate upon it by Herrn Buchholtz who also cross-examined him as to certain inconsistencies.

The principal woman witness was then called and she gave her evidence without being sworn, although Herr Buchholtz impressed upon her the necessity of speaking the truth and the fact that maliciously withholding information was regarded in the same light as positive falsehoods. She was also asked whether she was related to the accused. If witnesses are related to the accused they are excused from giving evidence and may be excused from taking the oath. Here the wide variety of relationships entailing privilege from giving evidence in the law of the Federal Republic of Germany may be contrasted with the narrowness of English law. In the Federal Republic the relationships include[1]: engaged persons, husband and wife even when the marriage is no longer existing, certain relatives of the accused, priest and one who confesses (in this case since the confession is a sacrament the priest cannot give evidence even with the consent of the accused), solicitors and medical practitioners in respect of anything the accused has confided in them, editors, publishers and printers in respect of libels published by them. It is to be noticed that, whereas in the case of solicitors and medical practitioners the privilege is that of the accused and can be waived by him, in the other cases it is the privilege of the witnesses that their conscience may not be torn between loyalty and justice. (I asked Herrn Buchholtz whether he was satisfied with this state of the law and why one did not include simple friendship or go the whole length and remove compulsion to give evidence altogether, but he replied that he was quite in favour of exemption for engaged persons, etc., although he thought it was going too far to excuse editors, printers and publishers.) If the above persons choose to give evidence it is nevertheless in the discretion of the court to excuse most of them from taking the oath. It is also in the discretion of the court to excuse the oath, if, having heard the evidence, all the members of the court are of the opinion that it is completely untrustworthy and that even under oath no greater truth is to be expected. If persons take the oath and commit perjury they are liable to from one to fifteen years' imprisonment with hard labour, whereas if they are excused the oath and do not speak the truth they are liable to a maximum of one year's imprisonment. Unjustified refusal to give evidence or to take the oath is punishable with a maximum of six weeks' imprisonment.[2] It is not obligatory for the oath to be administered at all in juvenile cases, although it often is as will be seen.

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[1] Strafprozessordnung 90, §§ 52, 53.

The woman witness's husband who had appeared on the scene of the offence shortly after its committal and had caught a glimpse of the youth was then called and he likewise did not take the oath. The youth was asked, as he was at the end of each witnesses's evidence, whether he would like to question the witness, but he declined.

Finally, a policeman was called. In a practised manner and without being asked, he immediately stated that he was not related to the accused before he proceeded to give his evidence. The oath, when administered, is administered after the witness has given his evidence and is accompanied perhaps with a little more ceremony than in England. Thus immediately after the policeman had given his evidence the court stood to attention while Herr Buchholtz asked the policeman: " You swear *by the omniscient and allpowerful God* that to the best of your knowledge you have spoken the pure truth and have withheld nothing? " The policeman replied: " I swear it *so help me God*."—The words in italics would have been omitted in the case of an atheist.

The probation officer then recounted the history of the youth including the fact that he had previously been found guilty of a similar offence—this again although the youth's guilt on the present charge had not yet been established.

The parents were then asked in turn whether they had anything to say but they volunteered little information.

It was now the turn of the state prosecutor to dissect the case and he agreed that although the boy was over eighteen he should still be treated as a youth on account of his physical and mental immaturity. There are two classes of juveniles, fourteen to eighteen years, juveniles proper, and eighteen to twenty-one years, juveniles approaching manhood, and a youth in this latter group may still be treated as a juvenile if his retarded development demands it. The state prosecutor asked that the youth should be sentenced to four weeks' "juvenile arrest" bearing in mind that warning had failed on the previous occasion.

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[2] StPO. 90, § 70.

There are four types of sentence possible for juveniles: (i) penance—the youth could be ordered to pay a certain sum of money (the maximum as in the case of adults is £844 3s. 4d. and failure to pay in the case of a child renders the child liable to a maximum of two weeks' "juvenile arrest") to a charitable institution such as the Red Cross or to conform to any similar court order; (ii) "juvenile arrest"—this may last a maximum of four weeks; (iii) "approved schools"; (iv) "borstal" and fines. Since the first two "measures" (Massnahmen) are not such punishment as would be recorded against the child they are not the subject of appeal. If the penance imposed is patently inordinate the only way of attacking it is by obtaining pardon. Although the penance is paid direct to the charitable institution, this body cannot thwart the court order by waiving payment, for a receipt must be given to the court. The third possibility, although it is likewise not such punishment as would be recorded against the child, is nevertheless subject to appeal, as is the fourth, which is a punishment recorded against the child.

The youth was asked whether he had any comments to make upon what the state prosecutor had said but he had none. The father stood up and protested that if the youth were "arrested" in the manner suggested he would lose his work and this was difficult to obtain. Herr Buchholtz asked whether the youth was entitled to any leave, but the boy answered that he was not. The bench then retired.

After a short time the bench returned and the court stood to attention as Herr Buchholtz read the sentence of three weeks' "juvenile arrest," a penance of £4 5s. 0d. and costs of £1 7s. 4d.—since there was no "punishment" the costs were limited to payment for the attendance of witnesses. The court resumed their seats while Herr Buchholtz lectured the youth telling him that the bench were aware of the sexual problems of adolescence but impressing upon him the enormity of the offence. The session ended with Herrn Buchholtz explaining the rights of appeal which in this case existed merely against the finding of guilt since the sentence was confined to "measures." Notice of appeal against the finding of guilt must be given within a week.

The lay magistrates, their duty done, then joined me in the public part of the court to listen as Herr Buchholtz dealt with the next case on the list. Although some of the following cases were juvenile trials in camera (but not sexual and the accused were from far away villages) some twenty fifteen-year-old boys and girls from the highest class of the local " secondary modern " school were also present with their teacher.

# *Practice and Procedure*

## Quarter Sessions

### *The qualifying previous convictions for preventive detention*

In *R.* v. *Browes* (1949) 33 Cr.App.R. 164 Lord Goddard C.J., interpreting section 29 of the Criminal Justice Act, 1948, said: " The court has no doubt that the intention of the Act is that once a person is sent forward to quarter sessions for sentence he is to be treated for all purposes as though he had been convicted on indictment." The expression " all purposes " is exceedingly wide and at first glance may seem to dispose of any possible doubt that a " section 29 case " may rank as one of the three previous convictions " on indictment " which are required to give jurisdiction to sentence to preventive detention. But the matter is not as simple as that. In the first place Lord Goddard's dictum was *obiter,* the appeal having been disposed of on another point, and in the second, it can be argued that the court was only considering the powers of quarter sessions in the section 29 proceedings themselves and not the effect of those proceedings for other purposes. It is worth while to consider the wording of section 29 and to compare it with that of section 21 which deals with the conditions precedent to a sentence of preventive detention.

In section 29, the offender may be dealt with " in any manner in which he could be dealt with by a court of quarter sessions before which he had just been convicted of the offence on indictment." One of the ways in which he could have been so dealt with would have been by a sentence of preventive detention provided, of course, that the conditions laid down in section 21 had been satisfied. One of these conditions is proof of three previous convictions " on indictment." Under section 29, therefore, the offender may be dealt with as if he had been convicted on indictment. In section 21 he must have been previously convicted on indictment. The question is whether a section 29 case is a conviction on indictment for the purposes of section 21. For the reasons given it is submitted that Lord Goddard's dictum in *R.* v. *Browes,* though a convenient and common-sense interpretation of the Act, is not necessarily conclusive.

The point is of some importance as there are recidivists whose usual crimes are among those frequently dealt with summarily up to conviction and who would be only too happy to elect summary trial when given the chance if by so doing they could keep out of the danger zone for preventive detention a bit longer. It is to be hoped that the Court of Criminal Appeal will have an opportunity of deciding the point in the near future.

There is no difficulty over corrective training or orders under section 22. In neither of these cases is it necessary to prove that the qualifying previous convictions were "on indictment." [Brigadier A. C. C. Willway, C.B., C.B.E., T.D., D.L., Chairman, Surrey Quarter Sessions.]

### Coroners' Courts

*Home Office circular*

The Home Office has issued a circular (No. 40/1956, dated April 16, 1956), to coroners, which revises and consolidates all previous circulars relating to deaths from industrial accidents and diseases.

## Summary Justice

*Aliens*

Polish citizen failing to report his marriage to a British subject in August, 1949; fined 10s., ordered to pay 10s. 6d. costs; Kaminski: Norman Cross Magistrates' Court (*Peterborough Citizen and Advertiser*, April 20).

*Animals*

Dogs. Man failing to carry out magistrates' order to have his two Alsatian dogs destroyed and not paying two fines of £22 imposed for this failure; sentenced to twelve weeks' imprisonment; Branson: Buxton Magistrates' Court (*Manchester Guardian*, April 20). (Released from prison on payment of the fine.)

Dogs. Allowing a "large unmuzzled ferocious dog" (an Alsatian) to be at large; fined £2; Holder-Vale: Sutton Magistrates' Court (*Evening Standard*, April 18).

Dogs. Failing to keep dog under control between sunrise and sunset; fined 10s.; Mathews: West Riding Magistrates' Court (*Wakefield Express*, March 24).

Dogs. Man looking after stray dog which was found worrying a hen; fined 10s. for being custodian of a dog which worried livestock on agricultural land, and 5s. for keeping dog without a licence; Yates: Widnes Magistrates' Court (*Liverpool Echo*, April 9).

Food. Selling unsterilised horse-meat for a dog; fined £1; Grafton: Birmingham Magistrates' Court (*Birmingham Mail*, April 13).

Poultry. Two poultry dealers failing to keep proper records and moving poultry illegally; fined a total of £1,040; Wernick, Wernick: Willenhall Magistrates' Court (*Birmingham Mail*, April 26).

Rats. Causing unnecessary suffering to a captive rat by unreasonably inciting a dog to attack it; fined £2; Harwood: Nuneaton Magistrates' Court (*Manchester Guardian*, April 27).

### *Assault*

Passenger assaulting with a bottle a bus conductor who followed him into the road for a halfpenny unpaid on a 2½d. fare; sentenced to four months' imprisonment for assault and causing actual bodily harm, and one month's imprisonment for maliciously damaging the conductor's jacket; Thomson: Clerkenwell Magistrates' Court (*Evening Standard*, April 23).

### *Children*

Employment. Two boys, aged 10 and 14, working three to four hours in bakery before going to school, and working there in the evening and at lunch-time; employer fined £5, father fined £4 for permitting his children to be so employed; Sharp, Sheppard: Birmingham Magistrates' Court (*Manchester Guardian*, April 21).

Throwing phosphorus. Two boys, aged 15, stealing phosphorus from school laboratory and throwing it at home of one of the masters; both put on probation for stealing, first ordered to appear at attendance centre for twelve hours and second fined £2 for throwing the phosphorus: Hull Juvenile Court (*Yorkshire Evening Post*, April 11).

### *Firearms, explosives and offensive weapons*

Air pistol. Maliciously wounding another boy with an air gun pellet; fined £2: Wallasey Juvenile Court (*Liverpool Echo*, April 17).

Air pistol. Boy, aged 16, firing air pistol within fifty yards of a public highway; fined £2: Gravesend Juvenile Court (*Evening Standard*, April 24).

Firearms. Possessing a ·32 calibre revolver without a licence; revolver partly dismantled and not capable of being fired; fined £2; Clarke: Leeds Stipendiary Magistrates' Court (*Yorkshire Evening Post*, April 11).

Offensive weapon. Having an offensive weapon, namely, a pair of scissors, and threatening girl with them; fined £5, bound over; Porcelli: Bow Street Magistrates' Court (*Evening Standard*, April 20).

### *Food and drugs*

Butter. Cafe owner selling bread and mixed margarine and butter as bread and butter; managing director fined £10, ordered to pay £1 15s. analyst's fee; Jones: Mold Magistrates' Court (*Liverpool Echo*, April 30).

### *Game*

Poaching a pheasant and trespassing in search of game; fined £2 for first offence, £1 for second; Taylor: Haywards Heath Magistrates' Court (*Evening Standard*, April 9).

### *Highways*

Obstruction. Fruiterer auctioning a hundred boxes of bananas likely to go bad causing crowd to collect on pavement; fined £1; Smith: Worcester Magistrates' Court (*Birmingham Mail*, April 26).

### *Larceny, etc.*

Larceny. Stealing two rose bushes worth £1 from front garden of a house; fined £2; Caney: Harrow Magistrates' Court (*Evening Standard*, April 24).

Larceny. Housewife stealing a bottle of milk "for spite"; fined £3; Harbison: Clerkenwell Magistrates' Court (*Evening Standard*, April 26).

Gas meter. Using clipped halfpennies in gas meter instead of shillings; sentenced to three months' imprisonment; Pillifant: Birmingham Magistrates' Court (*Birmingham Mail*, April 6).

### *Railways and ships*

Railways. Opening a carriage door while a train was in motion; passing goods train tore door completely off; fined £2; Carey: Widnes Magistrates' Court (*Liverpool Echo*, April 30).

Railways. Sailor waving a red flag from an express train; recognised signal that guard has seen obstruction or that emergency has arisen; fined £2; Marsden: Burnham-on-Sea Magistrates' Court (*The Star*, April 9).

Ships. Two seamen stowing away in liner at Melbourne, Australia; sentenced to four weeks' imprisonment; Contannon, Bauress: East Ham, East London Magistrates' Court (*Liverpool Echo*, April 16).

*Road traffic*

Parking. Parking car on the wrong side of the road after darkness; fined £2; Palmer: Warrington Magistrates' Court (*Liverpool Echo*, April 13).

Insurance. Altering an insurance cover note; fined £5 for altering an insurance certificate with intent to deceive and £5 for using the certificate; Percival: Birkenhead Magistrates' Court (*Liverpool Echo*, April 12).

Speeding. Driving car at between 45 and 52 m.p.h. in built-up area; driver "spiritually intoxicated by the magic of Tchaikovsky's Fifth Symphony"; fined £2 10s.; Beck: Sheffield Magistrates' Court (*The Star*, April 9).

# *Case and Comment*

The reports of cases to which initials are appended hereunder have been specially prepared for *The Criminal Law Review* by the following reporters:—

HENRY PALMER, *Barrister-at-Law.*

J. D. PENNINGTON, *Barrister-at-Law.*

**Appeal**—*Reference to Court of Criminal Appeal by Home Secretary.* See R. *v.* SPARKES, p. 411, below.

**Assault**—*Justification—captain of ship assaulting immigration officer*

HADDLETON *v.* HOLWERDA[1] (Q.B. Divisional Court: Lord Goddard C.J., Cassels and Donovan JJ.: April 18, 1956) (*The Times*, April 19, 1956).

An immigration officer boarded a motor vessel as she was entering a dock as he wished to interview a passenger aboard and examine his passport. The passenger having been interviewed went to the bridge of the ship. The immigration officer followed and asked the captain, who was in the wheelhouse, whether the passenger intended to land and whether he would produce his passport. The captain told the officer that his inquiries would be dealt with after the ship had been berthed, and ordered him to leave the bridge. The immigration officer said that he would if asked in a proper manner. The captain feeling that his attention was being distracted from his navigation lost his temper, struck the immigration officer, seized him by the legs and shoulder and tried to throw him down the stairs of the bridge, but desisted when his own glasses fell off and were broken. On an information against the captain alleging assault contrary to section 43 of the Offences against the Person Act, 1861, the justices were of the opinion that although the immigration officer was entitled to board the ship, the captain had been provoked by him and that the captain's conduct was justified. Accordingly, they dismissed the information. On appeal:—

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[1] For the immigration officer: *Rodger Winn* (instructed by Treasury Solicitor). For the captain: *Michael Kerr* (instructed by Sinclair, Roche & Temperley).

*Held*, allowing the appeal, that, on the facts, the justices could not hold that the captain's conduct was justified. They had confused mitigation with defence and the case must go back with an intimation that they should convict. [J. D. P.]

COMMENTARY. Assault is only justified where the person assaulted has consented to it or where force is used in the due execution of the law, in lawful correction or in defence of one's person or property.

The Grimsby magistrates reconsidered this case on May 7 and finding the defendant guilty granted him an absolute discharge. No order was made as to costs.

See Archbold, 33rd ed., 991 *et seq.*

**Coroner**—*Application to quash verdict of suicide—evidence*

*Re* LAWRENCE [2] (Q.B. Divisional Court: Hilbery, Cassels and Donovan JJ.: April 10, 1956; Court of Appeal: Singleton, Morris and Romer L.JJ.: April 16, 1956) (*The Times*, April 11, 17, 1956).

A boy aged seventeen was found in bed mortally wounded with a revolver shot in his head. There was evidence that the firearm was within a few inches of the boy's head, but there was no evidence of how it was discharged or why. At the inquest the jury returned a verdict of suicide while the balance of the boy's mind was disturbed. The boy's father applied under section 6 of the Coroners Act, 1887, to the Divisional Court for leave to apply for an order of certiorari to quash the verdict of the jury on the ground that there was no evidence to support the verdict and that there was an insufficient inquiry. At the hearing before the Divisional Court affidavit evidence of a gunsmith was produced to show that the weapon was sixty years old and was in such a condition that it could have gone off with no pressure on the trigger. The Divisional Court, holding that there was evidence to support and justify the jury's verdict, refused the application. On appeal counsel for the applicant submitted that before the jury could find a verdict of suicide they had to assume (*a*) that the boy knew that the revolver was loaded, (*b*) that he knew that the cartridge in the chamber was a live cartridge, and (*c*) that he pulled the trigger; it was not competent for the coroner or jury to draw the conclusion that those facts were within the knowledge of the boy. It was sheer conjecture.

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[2] For the applicant: *Philip Cox* (instructed by Rising & Ravenscroft for H. E. Wynschenk & Co., Birmingham).

The court gave the applicant leave to apply for an order of certiorari. [J. D. P.]

COMMENTARY. A coroner's inquest is not bound by the strict rules of evidence: *R.* v. *Divine, ex p. Walton* [1930] 2 K.B. 29, 36. In that case Talbot J. defined the position of the High Court under section 6 of the Coroners Act, 1887, by saying: "The court is not to attend to mere informalities, nor to criticise minutely the summing-up, or the nature of the evidence or of the procedure. But if the inquest has been so conducted, or the circumstances attending it are such that there is real risk that justice has not been done, a real impairment of the security which right procedure provides that justice is done and is seen to be done, the court ought not to allow the inquisition to stand."

On May 15 the Court of Appeal dismissed the father's application for an order of certiorari to quash the coroner's verdict.

### **Court of Criminal Appeal**—*Reference of case by Home Secretary—fresh evidence*

R. *v.* SPARKES[3] (Court of Criminal Appeal: Lord Goddard C.J., Cassels, Lynskey, Donovan and Havers JJ.: April 16, 23, 1956) ([1956] 1 W.L.R. 505; [1956] 2 All E.R. 245).

S. was convicted at Surrey Quarter Sessions on April 23, 1952, of conspiracy, housebreaking and larceny and was sentenced to five years' imprisonment. On July 21, 1952, his appeal to the Court of Criminal Appeal on the ground of misdirection was dismissed. While serving his sentence, S. presented a petition to the Home Secretary alleging that he had been wrongly convicted, supporting the petition with his passport in force in 1950, which he alleged showed he had been out of the country at certain relevant dates. The Home Secretary referred the matter to the Court of Criminal Appeal under section 19 (*a*) of the Criminal Appeal Act, 1907. It was contended on behalf of S. that, had the passport been produced at the trial, the evidence of the chief witness for the prosecution would have been so shaken that the jury might well not have believed him at all, and that the conviction ought, therefore, to be quashed. The prosecution objected to the court receiving the passport in evidence upon the ground that it was not fresh evidence, *i.e.*, evidence which could not have been produced at the trial or evidence arising out of some point which could not have been foreseen at the trial.

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[3] For the appellant: *Sebag Shaw* (instructed by Irwin Shaw). For the Crown: *Sir Reginald Manningham-Buller, Att.-Gen., Q.C., J. C. Phipps* (instructed by the Director of Public Prosecutions).

*Held*, dismissing the appeal, that even if the passport had been produced at the trial, there was no reason to think that the result of the trial would or might well have been different. The main witness for the prosecution was M. who said that there were conversations between S. and himself in August, September and early October, 1950, at which the proposed robbery was discussed. The passport produced by S. purported to show that S. was out of the country from July 13 to October 19, 1950. However, M. gave evidence of other conversations with S. when plans concerning the offence were discussed, which took place after October 19, 1950, at a time when S. was admittedly in the country. In the face of that evidence, it was impossible to say that, if M. had been shown to be wrong in referring to meetings in August, September and early October, the jury would or might have acquitted S. Further, it was impossible to believe S. when he said that the reason why he did not give evidence himself that he was abroad during the summer of 1950 was that he forgot. For these reasons the appeal would be dismissed.

The prosecution had contended that the court ought not to receive the passport in evidence: the present reference was to be treated in all respects as an appeal and, therefore, the well-established rule of practice applied that fresh evidence would not be received unless that evidence could not have been produced at the trial or that some point which could not have been foreseen arose at the trial. No general rule was to be deduced from the precedents. Each case must be decided upon its merits, though the court would not treat itself as bound by the rule of practice if there was reason to think that to do so might lead to injustice or the appearance of injustice. In the present case the court thought it better to look at the entries in the passport lest it be thought that a review of the case had been refused for a reason which was merely procedural. [H. P.]

COMMENTARY. In *R.* v. *McGrath* [1949] 2 All E.R. 495, fresh evidence was admitted on a basis difficult to reconcile with the present decision. There it was held that, since the object of a reference to the Court of Criminal Appeal by the Home Secretary was to assist him in respect of the exercise of the Royal prerogative, any evidence could be considered which might achieve that object. In such cases the court were in fact exercising the " much wider discretion " of the Home Secretary. " He can hear and consider any evidence he likes which would influence him in considering whether or not he should advise the exercise of the Royal prerogative." A similar course was followed in *R.* v. *Collins* (1950) 34 Cr.App.R. 146. The present decision accords more with the wording of section 19 (*a*) which provides that a case heard under that section shall " be heard and determined . . . as in the case of an appeal by a person convicted." See also the Criminal Appeal Rules, 1908, r. 48.

Reported cases concerning such references by the Home Secretary are few. In *R.* v. *Gray* (1917) 12 Cr.App.R. 244, the Court of Criminal Appeal quashed a conviction of manslaughter where fresh evidence threw doubt on the motive for killing alleged by the prosecution. In *R.* v. *Fratson* (1930) 22 Cr.App.R. 29 the court dismissed an appeal where fresh evidence raised no reasonable doubt as to the appellant's guilt.

See Archbold, 33rd ed., 335.

### **Customs and Excise**—*Import of goods—whether salmon soaked in brine within terms of licence*

WILTS QUALITY PRODUCTS (LONDON) *v.* CUSTOMS AND EXCISE [4] (Chancery Division: Harman J.: April 25, 1956) (*The Times*, April 26, 1956).

The plaintiffs, who were food importers, were desirous of importing from Holland jars containing pieces of salmon soaked in brine and described as " Crownfish Salmon." On a summons to determine whether they could be imported under the provisions of the Open General Import Licence dated January 21, 1954, as amended on April 20, 1954, made under the Import of Goods (Control) Order, 1954,

*Held*, that the product was a " fish product frozen or preserved " within Sched. 3 of the licence and therefore could be imported. [J. D. P.]

COMMENTARY. This case is reported because it is an offence to import goods into the United Kingdom except under the authority of a licence made under the Import of Goods (Control) Order, 1954 (S.I. No. 23; [1954] Crim.L.R. 224):

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[4] For the company: *Gilbert Paull Q.C.*, *Ralph Instone* (instructed by Gouldens). For the Customs: *Denys Buckley* (instructed by Solicitor, Customs and Excise).

### **False Imprisonment**—*Detention by police—reasonable suspicion of illegal activity*

PEACOCK AND HOSKYN *v.* MUSGRAVE AND PORTER[5] (Queen's Bench Division: Streatfeild J. and a jury: April 16, 1956) (*The Times*, April 17, 1956).

The plaintiffs were walking along a road in a village having left their car further along the road, when they were stopped by two policemen who suspected that the vehicle had been stolen. At the time the plaintiffs were wearing plimsolls. They produced a driving licence and gave the registration number of the vehicle, but it was alleged they were seized and hustled across the road to the police station where their particulars were taken and they were then allowed to go. The plaintiffs brought an action against the police for assault and false imprisonment.

Streatfeild J. directed the jury that it was a matter of great importance that the individual's rights and privileges should be preserved and recognised by the courts. On the other hand, the police had their duties to perform, and although this might on occasion cause annoyance and inconvenience to the individual it was the duty of everyone to co-operate with the police. The public should not resent such interference with their liberties as might be required to enable the police to carry out their duties with efficiency and propriety. The judge held as a matter of law that there was reasonable and probable cause for stopping and detaining the plaintiffs for questioning on suspicion of stealing, receiving or driving and taking away the car.

The jury found that the detention, although justified, was prolonged longer than was reasonably necessary and awarded £5 to each plaintiff. The jury also found that in the case of Peacock more force was used than was reasonably necessary and he was awarded a further 20s. Costs were awarded to the plaintiffs. [J. D. P.]

COMMENTARY. In an action for false imprisonment the question whether the defendant had reasonable and probable cause for his action is one of law for the judge to decide: *Hailes* v. *Marks* (1861) 7 H. & N. 56. Therefore it is for the judge to decide whether the suspicion of the police is reasonable.

See Archbold, 33rd ed., 1071.

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[5] For the plaintiffs: *W. Percy Grieve* (instructed by Gibson & Weldon for Poole & Co., Bedford). For the defendants: *Mervyn Griffith-Jones* (instructed by Sharpe, Pritchard & Co.).

### **Food and Drugs**—*Food not of the nature, substance or quality demanded—dead fly in milk*

NEWTON *v.* WEST VALE CREAMERY CO.[6] (Q.B. Divisional Court: Lord Goddard C.J., Cassels and Donovan JJ.: April 27, 1956) (*The Times*, April 28, 1956).

A milk retailer delivered to a customer six bottles of milk with tin foil caps. When one of the bottles was opened it was found to contain a dead housefly floating on top of the milk. On an information against the supplier of the milk under section 3 of the Food and Drugs Act, 1938, the justices were of the opinion that there was no sale to the prejudice of the purchaser and dismissed the information. On appeal by the prosecutor,

*Held*, allowing the appeal, that although the presence of a foreign body in the milk did not necessarily make it unfit for human consumption contrary to section 9 of the Act of 1938, its presence could make the milk not of the quality or nature demanded under section 3. In the circumstances an offence under section 3 had been proved and the case should go back to the justices. [J. D. P.]

COMMENTARY. The magistrates heard this summons before the decision of the Divisional Court in *J. Miller* v. *Battersea Borough Council* [1955] Crim.L.R. 779 was reported. In that case it was held that while the presence of a piece of metal in a bun did not make the bun unfit for human consumption, a charge might be brought under section 3 of the Food and Drugs Act, 1938. This case follows that decision. For criticism of *Miller's* case see the article by Mr. J. C. Smith at [1956] Crim.L.R. 101.

### **Food and Drugs**—*Label calculated to mislead—fillets of catfish labelled " mock halibut fillets "*

NOTTINGHAMSHIRE COUNTY COUNCIL *v.* EMERSON [7] (Nottingham Magistrates' Court: Mrs. G. F. Seely, Chairman: April 17, 1956).

The defendant was charged with displaying on a tray of fillets of catfish a label which was calculated to mislead, inasmuch as it bore the words " Mock Halibut Fillets," contrary to section 6 of the Food and Drugs Act, 1955. The facts were agreed by the parties, namely, that skinned and filleted catfish—a fish for obvious reasons never sold under its own name—was sold from a tray bearing the label " Mock Halibut Fillets " at a price slightly more than half the price of halibut fillets. A blackboard outside the shop, setting out the various types of fish for sale, also included " Mock Halibut Fillets." For the prosecution it was contended that the label should not have contained the word " Halibut." The defence contended that no customer would be misled having regard to the word " Mock " appearing on the label, coupled with the price, and drew an analogy with " Mock Turtle Soup."

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[6] For the prosecutor: *Paul Wrightson* (instructed by Gibson & Weldon for R. Rose, Morecambe and Heysham). For the defendant: *J. H. R. Newey* (instructed by Wilberforce, Allen & Bryant for Gorton & Penhale, Morecambe and Heysham).

[7] For the prosecution: T. L. E. Gregory, Chief Inspector of Weights and Measures. For the defendant: *D. M. Cowley* (instructed by Woodsend & Dewhurst, Eastwood).

*Held*, applying the test laid down by Wrottesley J. in *Concentrated Foods, Ltd.* v. *Champ* [1944] K.B. 342, that the label was not calculated to mislead any ordinary person and that there was no case to answer.

[Arthur Cust, *Clerk to the Justices.*]

COMMENTARY. The Food and Drugs Act, 1955, is a consolidating Act and this case follows the previous authority of *Concentrated Foods, Ltd.* v. *Champ.*

See Stone, 88th ed., 917.

### **Hawkers and Pedlars**—*Maintaining stall for sale of articles—continuing offence*

EDWARDS *v.* GUBAY [8] (Q.B. Divisional Court: Lord Goddard C.J., Cassels and Donovan JJ.: April 24, 1956) (*The Times*, April 25, 1956).

On October 8, 1955, ninety-six informations were preferred against the defendant that he on divers days between July 25 and September 11, 1955, at Rhyl did maintain on land adjoining the West Parade, stands for the sale of rock, hot sausages and candy floss without the consent in writing of the urban district council contrary to section 134 of the Rhyl Urban District Council Act, 1935. Separate informations were preferred in respect of the maintenance of the stands on each day. The defendant had previously been convicted of maintaining a stand on July 8, 1955, and, contending that the offence of " maintaining " a stand was a continuing offence, pleaded *autrefois convict*. The justices upheld the defendant's contention and dismissed the informations. Ninety-five informations preferred against three other persons charging them with maintaining stands during substantially the same period were dismissed by the justices on the same grounds. The prosecutor appealed.

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[8] For the prosecutor: *G. D. Squibb Q.C.*, *Ronald Waterhouse* (instructed by Field, Roscoe & Co., for Isaac Edwards & Owens, Rhyl). For the defendant: *Edward Steele* (instructed by Soames, Edwards & Jones for Joseph Lloyd & Co., Rhyl).

*Held*, dismissing the appeals, that the offence of "maintaining" under section 134 of the Act of 1935 was a continuing one and the defendants were entitled to plead *autrefois convict.*

*Per* LORD GODDARD C.J. It was oppressive to wait until September before laying the informations; the council should have taken proceedings earlier. [J. D. P.]

COMMENTARY. Although in *Flatman* v. *Light* [1946] K.B. 414 Lord Goddard C.J. doubted whether in a magistrates' court a plea that a man has already been convicted of a previous offence is in any strictness a plea of *autrefois convict*, the principle that a man may not be put twice in jeopardy for the same offence applies.

**Information**—*Information charging a number of thefts over a period of time.* See WILSON *v.* READ, p. 418, below.

**Jurisdiction**—*British aircraft—offence committed on British aircraft while flying outside United Kingdom*

R. *v.* MARTIN[9] (Central Criminal Court: Devlin J.: March 22, 1956) ([1956] 2 W.L.R. 975; [1956] 2 All E.R. 86).

M. and two others were charged with being in possession of raw opium on British aircraft flying between Bahrein and Singapore contrary to regulation 3 of the Dangerous Drugs Regulations, 1953. Before the defendants pleaded to the charge their counsel moved to quash the indictment on the ground that the court had no jurisdiction to try the offence alleged in it. It was conceded by the Crown that the regulation by itself applied only to the possession of a drug in England, but it was contended that by section 62 of the Civil Aviation Act, 1949, any act, which would be an offence if committed in England was an offence if committed on a British aircraft.

*Held*, that section 62 did not create an offence, but merely determined the place where an act, which was already an offence, should be tried if committed on a British aircraft outside England;

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[9] For the Crown: *Christmas Humphreys, E. J. P. Cussen* (instructed by the Director of Public Prosecutions). For the defendants: *John Foster Q.C., Alan Campbell, S. C. Silkin, A. Melford Stevenson Q.C., Alan Orr, W. A. B. Forbes* (instructed by Theodore Goddard & Co., Lewis Silkin & Partners and J. H. Milner & Son).

accordingly, as regulation 3 only applied to acts committed in England, the defendants had committed no offence under English law by being in possession of opium outside England. [J. D. P.]

COMMENTARY. At common law no offence committed outside England is an offence against English law. To this rule there are a number of statutory exceptions relating to offences committed on land or on ships outside England; see, for example, the Offences against the Person Act, 1861, s. 9, and the Offences at Sea Act, 1536, s. 1. In the present case the contention of the prosecution was that section 62 (1) of the Civil Aviation Act, 1949, provided a further exception to the rule in relation to offences committed on British aircraft abroad. Section 62 (1) provides: "Any offence whatever committed on a British aircraft shall, for the purpose of conferring jurisdiction, be deemed to have been committed in any place where the offender may for the time being be."

See Archbold, 33rd ed., 28–38.

**Larceny by a Servant**—*Information—information charging number of thefts over period of time—time and amounts of thefts not specified*

WILSON *v.* READ; BLYTH *v.* READ[10] (Q.B. Divisional Court: Lord Goddard C.J., Cassels and Donovan JJ.: April 27, 1956).

The two defendants were separately charged before justices with stealing quantities of coal and coke, from their employers, contrary to section 17 of the Larceny Act, 1916. The thefts were alleged to have taken place over periods of approximately three and a half and three years respectively. In both cases, it was alleged that the thefts took place on a number of separate occasions during these periods. In no case was there evidence of the date or the precise amount of any particular asportation, On behalf of each of the defendants it was contended that the informations were bad for duplicity on the ground that the evidence disclosed a series of separate offences of larceny by a servant, and that it was wrong in law and contrary to rule 14 (1) of the Magistrates' Courts Rules, 1952, to charge in one count the theft of the total amounts alleged to have been stolen in quantities and at places unstated over a period of years, and that such a course of conduct could not be regarded as forming a continuous offence. The defendants were convicted and appealed. The objections raised on appeal were the same as those raised before the magistrates.

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[10] For the defendants: *Michael Havers* (instructed by Haslewood, Hare, Shirley Woolmer & Co. for Cadge & Gilbert and Leathes Prior & Son, Norwich). For the prosecutor: *Leslie Boreham* (instructed by P. F. Rodwell, Halesworth).

*Held*, dismissing the appeal, that if separate larcenies could be proved the right course was to make separate charges. This was a rule of practice which ought to be observed, but ought not to be elevated to a rule of law in cases in which it was impossible to prove separate larcenies. The position with regard to cases in which the charge was based on a general deficiency was clearly stated in *R.* v. *Lawson* (1952) 36 Cr.App.R. 30, which was approved in *R.* v. *Tomlin* [1954] Crim.L.R. 540. In the latter case it was said that in cases where particular takings could not be proved it was sufficient for the prosecution to prove that there had been a conversion or embezzlement of the general balance on a day between specified dates. The doctrine in *R.* v. *Tomlin* was to be applied, and the informations were not bad for duplicity.

[D. Trafford Owen, *Barrister-at-Law*.]

COMMENTARY. This decision specifically applies to larceny by a servant, a principle already applied to indictments for fraudulent conversion (*R.* v. *Lawson*) and embezzlement (*R.* v. *Tomlin*). The reason for allowing a count charging a general deficiency is that the courts are unwilling " to elevate a rule of practice, applicable to circumstances where it may be required to avoid injustice, into a rule of law applicable to circumstances where it will defeat justice ": *per* Pearson J., *R.* v. *Tomlin* [1954] 2 Q.B. 274, 282.

See Archbold, 33rd ed., 646.

### **Local Government**—*Member of council—pecuniary interest*

BROWN *v.* DIRECTOR OF PUBLIC PROSECUTIONS [11] (Q.B. Divisional Court: Lord Goddard C.J., Cassels and Donovan JJ.: April 17, 1956) ([1956] 2 W.L.R. 1087; [1956] 2 All E.R. 189).

At a meeting of a council of a local authority a resolution was moved that a lodger's levy payable by tenants of council houses who took in lodgers should cease to be payable except where tenants were members of the council. Before the motion was put to the meeting an amendment was moved which had the effect of putting councillor tenants on the same footing as other tenants. Six councillors who were tenants of council houses, having declared their interest as such, voted against the amendment. On informations against the councillors under section 76 of the Local Government Act, 1933, they were convicted and each fined £2 (see *D. P. P.* v. *Gibbs* [1955] Crim.L.R. 650). On appeal:—

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[11] For the councillors: *Sir Hartley Shawcross Q.C.*, *Miss J. Graham Hall* (instructed by Parker, Thomas & Co. for Max Engel & Co., Northampton). For the Director of Public Prosecutions: *Sir Harry Hylton-Foster Q.C., S.-G.*, *Neil McKinnon*, *Paul Wrightson* (instructed by Director of Public Prosecutions).

*Held*, that the councillors as tenants of council houses had a pecuniary interest in matters affecting the rents of such houses within the meaning of section 76 (1) and whether or not the result of the vote was to their advantage they were precluded from voting thereon by that section and in so doing were guilty of an offence. [J. D. P.]

COMMENTARY. This case is rendered more important by the fact that probably many councils will soon be reviewing the rents of council houses and the inability of even a small number to vote might result in the adoption of a policy to which the majority of the council are opposed. The Minister of Housing and Local Government may remove the disability on voting on a particular matter in favour of a particular councillor. When questioned in the House of Commons about the exercise of this discretion the Minister replied that the policy normally followed by successive Ministers has been to allow councillors who are tenants of council houses to vote on questions affecting rents only where half or more of the members would otherwise be disqualified. However, in cases where the rental policy of the council is to be considered the Minister will be prepared to consider sympathetically an application for the removal of the disability to vote, provided that such an application is supported by a resolution of the council concerned (H.C. Debates, Vol. 549, col. 996; February 28, 1956).

**Marriage**—*Forgery of parents' consent to marriage.* See R. *v.* FRICKEY, p. 421, below.

**Perjury**—*Ceylon—exercise of summary power of court*

SUBRAMANIAM *v.* R.[12] (Judicial Committee of the Privy Council: Lords Oaksey, Tucker, Cohen and Keith of Avonholm and Mr. L. M. D. de Silva: April 10, 1956) ([1956] 1 W.L.R. 456).

During a murder trial in Ceylon, the judge being of the opinion that evidence about the murder was being suppressed, called a number of witnesses and cross-examined them in connection with the alleged suppression of the evidence. Having formed the opinion that the appellant, who had been called for the prosecution, was committing perjury, he directed the acquittal of the prisoner and at a later hearing, after hearing witnesses, in purported exercise of his power under section 440 (1) of the Criminal Procedure Code, sentenced the appellant to imprisonment. On appeal:—

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[12] For the appellant: *Phineas Quass Q.C., R. K. Handoo* (instructed by O. L. Blyth). For the Crown: *Biden Ashbrooke, T. O. Kellock* (instructed by T. L. Wilson & Co.).

*Held*, allowing the appeal, that the power under section 440 (1) should only be used when it was clear during a trial that a witness had committed perjury and it was never intended that a subsidiary investigation should be held against a witness. The appellant should have the costs of the appeal. [J. D. P.]

COMMENTARY. This case rests on the interpretation of section 440 of the Criminal Procedure Code of Ceylon, which provides: "If any person giving evidence on any subject in open court in any judicial proceeding under this Code gives, in the opinion of the court before which the judicial proceeding is held, false evidence within the meaning of section 188 of the Penal Code it shall be lawful for the court, if such court be the Supreme Court, summarily to sentence such witness as for a contempt of the court to imprisonment . . . for any period not exceeding three months . . . (4) In lieu of exercising the power given by this section the court may if it thinks fit transmit the record of the judicial proceeding to the Attorney-General to enable him to exercise the powers conferred on him by this Code or proceed in manner provided by section 380."

In England, under section 9 of the Perjury Act, 1911, a judge of, or person presiding in, a court of record or a petty sessional court, or any justice of the peace sitting in special sessions, who is of the opinion that anyone has in the course of the proceedings before him been guilty of perjury, may order the prosecution of that person for perjury. There is no such summary method of procedure as that provided in Ceylon.

### **Perjury**—*Declaration relating to marriage—forgery of parents' consent to marriage*

R. *v.* FRICKEY AND FRICKEY [13] (Southampton Quarter Sessions: The Hon. E. E. S. Montagu, Esq., C.B.E., Q.C., Chairman: March 27, 1956).

The defendants were alleged to have forged the signatures of the parents of one of them to a document purporting to be the parents' consents to the defendants' marriage. The document was a form issued for the convenience of Superintendent Registrars but its use is not mandatory. The defendants were charged with an offence under section 3 (1) (*a*) of the Perjury Act, 1911. They moved to quash the count on the ground that the document was not a "declaration, notice or certificate required under any Act of Parliament for the time being in force relating to marriage." Section 3

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[13] For the Crown: *Norman Brodrick* (instructed by Burley & Geach, Petersfield). For the male defendant: *John Southam* (instructed by Mackarness and Lunt, Petersfield). For the female defendant: *Arthur Mildon* (instructed by MacDonald, Jacobs & Oates, Petersfield).

(1) of the Marriage Act, 1949, enacts merely that the consent of certain persons shall be required when the marriage of an infant is to be solemnised. The defendants argued that since no particular form is required and the consent might be given orally the document was not "required" by the Act.

*Held*, the document did not fall within section 3 (1) (*a*) of the Perjury Act and the count was quashed.

[Charles Fay, *Barrister-at-Law*.]

COMMENTARY. This shows an interesting lacuna in the law. The case apparently cannot be brought either within the Forgery Act, 1913, there being no intent to defraud, or within any other provision of the Perjury Act. The male defendant in this case was convicted on another count of knowingly signing a false declaration, required under section 28 (1) of the Marriage Act, 1949, that the consents of both his parents had been obtained. But suppose a case in which the consents are forged by one party only and the other party without knowing of the forgery or falsehood signs the declaration under section 28 (1): neither has committed any offence under the law as it now stands.

### **Police**—*Appeal against decision of disciplinary board—unfit at time of hearing*

*Ex p.* JACOB[14] (Q.B. Divisional Court: Cassels and Donovan JJ.: April 13, 1956) (*The Times*, April 14, 1956).

By a decision of a disciplinary board J., a police inspector, was dismissed from the Metropolitan Police Force. J. applied for leave to apply for an order of certiorari to quash the decision on the ground that it was contrary to the principles of natural justice in that he was unfit by reason of his mental health at the time of the hearing to prepare his defence, to cross-examine witnesses or to give or call evidence. It was stated by counsel on his behalf that, at the time of the hearing, J. was a voluntary patient in a mental hospital and although his doctor agreed that J. was fit to plead in the limited sense of being fit to understand the charges against him, it was contended that the hearing should not have taken place unless J. was fit to attend, to give evidence, to cross-examine witnesses, and to conduct his defence. J.'s condition was described as psychotic with delusions of persecution.

*Held* that the application should be refused. [J. D. P.]

COMMENTARY. The Court of Appeal dismissed an appeal against this decision on April 16 (*The Times*, April 17, 1956).

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[14] For the applicant: *Michael Havers* (instructed by W. J. Fraser & Son).

**Police**—*Detention by.* See PEACOCK AND HOSKYN *v.* MUSGRAVE AND PORTER, p. 414, above.

**Road Traffic**—*Disqualification from driving—disqualification from driving motor-cars for private purposes*

WEST *v.* JONES [15] (Q.B. Divisional Court: Lord Goddard C.J., Cassels and Donovan JJ.: April 19, 1956) (*The Times*, April 20, 1956).

J. was found guilty of aiding and abetting his wife in driving a motor-car without a third party insurance being in force in relation to her use of the car. The justices disqualified J. "from driving motor-cars for private purposes." On appeal by the prosecutor:—

*Held*, allowing the appeal, that although section 6 of the Road Traffic Act, 1930, permits justices to limit any disqualification to the driving of a motor-vehicle of the same "class or description" as the vehicle in relation to which the offence was committed, it does not permit a limitation according to the use of the vehicle, and therefore the justices' purported limitation should be removed with the result that J. would be disqualified from driving motor-cars generally. [J. D. P.]

COMMENTARY. The question of limiting a disqualification arose in *Petherick* v. *Buckland* [1955] Crim.L.R. 118, where it was held that a disqualification might be limited to a particular class or description of vehicle. Here, however, the justices sought to limit the disqualification to a particular purpose and there is nothing in the Act permitting this.

For a criticism of the decision in *Petherick* v. *Buckland*, see the articles by Mr. A. E. Jones at [1955] Crim.L.R. 430 and by Mr. P. A. Palmer at [1955] Crim.L.R. 679, which point to the difficulties the case creates.

**Road Traffic**—*Driving without insurance—special reason for not disqualifying*

SWELL *v.* MCKECHNIE [16] (Q.B. Divisional Court: Lord Goddard C.J., Cassels and Donovan JJ.: April 19, 1956) (*The Times*, April 20, 1956).

The defendant bought a second-hand car and when stopped by the police and asked for his insurance certificate pointed to his road fund licence on the windscreen and said that he did not know that he had to be insured. On a charge under section 35 of the Road Traffic Act, 1930, the justices held that in the circumstances there were special reasons for not disqualifying the defendant from holding a licence. The prosecutor appealed.

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[15] For the prosecutor: *F. H. Lawton* (instructed by Sharpe, Pritchard & Co. for D. E. Morgan, Chelmsford). The defendant appeared in person.

[16] For the prosecutor: *Kenneth Bain* (instructed by Robbins, Olivey & Lake for Stephens & Scown, St. Austell). The defendant did not appear and was not represented.

*Held*, allowing the appeal, that such a finding made a farce of the Act and the case should go back with an order to disqualify for at least a year from the date of conviction. [J. D. P.]

COMMENTARY. This is an illustration of the general principle that ignorance of the law is no excuse. In *Whittall* v. *Kirby* [1947] K.B. 194, Lord Goddard C.J. said *obiter* that under section 35 of the Road Traffic Act, 1930, "mere forgetfulness or carelessness in not taking out a policy could not amount to a special reason." Such circumstances as these and the defendant's ignorance in the present case are peculiar to the offender and not to facts of the particular case. A special reason must be a circumstance special to the facts of a particular case.

**Sentence**—*Borstal training—substitution of term of imprisonment*

R. *v.* WARNER AND WHITE[17] (Court of Criminal Appeal: Hilbery, Cassels and Donovan JJ.: April 11, 1956).

The appellants, who were respectively nineteen and twenty years of age, were convicted, together with four other men, at the Central Criminal Court of two offences of wounding with intent to do grievous bodily harm and two of unlawful wounding. The offences took place during a public-house brawl in which bottles were used as weapons. Both men had two previous convictions. They appealed to the Court of Criminal Appeal against their sentences of Borstal training.

*Held*, that this was not a case for Borstal training, but for a sharp sentence of imprisonment. No leniency would be shown in future in cases of this sort where violence was used in licensed premises and bottles and glasses used for the purposes of wounding and injuring other people. In the circumstances of this case, the order for Borstal training would be set aside and one of eighteen months' imprisonment substituted in respect of each appellant. [H. P.]

COMMENTARY. Imprisonment may not be imposed on a person under twenty-one years of age unless the court is of the opinion that no other method of dealing with the offender is appropriate: Criminal

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[17] For the appellant White: *R. D. Harman* (instructed by E. A. Mathew, Monty Hellier & Co.). The appellant Warner appeared in person. The Crown was not represented.

Justice Act, 1948, s. 17 (2). In *R.* v. *Chambers* (1952) 36 Cr.App.R. 104, the Court of Criminal Appeal substituted a sentence of three years' imprisonment for one of Borstal training. The appellant had pleaded guilty to stealing lead, a type of offence then very prevalent and one of which the court took a grave view.

See Archbold, 33rd ed., 236.

**Sentence**—*Remission—not to be taken into account in imposing sentence*

R. *v.* MAGUIRE ; R. *v.* ENOS [18] (Court of Criminal Appeal: Lord Goddard C.J., Cassels and Donovan JJ.: April 23, 1956) (*The Times*, April 24, 1956).

M. was sentenced to seven years' imprisonment at Monmouth County Sessions for three offences, twenty other offences being taken into consideration. E. was sentenced at the same sessions to five years' imprisonment for four offences, eleven other offences being taken into consideration. M. and E. appealed to the Court of Criminal Appeal against their sentences on the main ground that the learned Deputy Chairman had, in calculating the length of sentence to be imposed, taken into account the amount by which the sentences would be reduced by remission.

*Held*, reducing the sentences, that, in determining the length of a prisoner's sentence, the court ought not to calculate how much time he would actually serve, assuming he behaved himself. The business of the court was to consider what was the proper length of imprisonment to impose for a particular offence. A prisoner had no right to remission, although under the Prison Rules, if he behaved himself, the Prison Commissioners could, and in most cases did, grant remission. It was not right for the court to say, as it did in M.'s case, that the proper sentence was one of four years and eight months and, therefore, the sentence would be seven years. The question of remission was not, as a general rule, to be taken into account when imposing sentence. The sentences would accordingly be reduced to five years in the case of M., and to three years in the case of E. [H. P.]

COMMENTARY. In an unreported case in 1951 the Court of Criminal Appeal did take into consideration the length of time the defendant would actually be kept in prison when assessing his sentence. That, however, was an exceptional case, concerning a defendant who for reasons unknown went around setting fire to haystacks.

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[18] For the appellants: *Henry Palmer* (instructed by the Registrar, Court of Criminal Appeal). The Crown was not represented.

**Sentence**—*Unlawful wounding—sentence reduced*

R. *v.* DENNYS [19] (Court of Criminal Appeal: Hilbery, Cassels and Donovan JJ.: April 10, 1956).

D. was charged at the Central Criminal Court with shooting with intent to do grievous bodily harm and wounding with intent to do grievous bodily harm. He pleaded not guilty to the two charges, but guilty to unlawful wounding. That plea was accepted by the court, and he was sentenced to three years' imprisonment. D. was a man of previous good character with no record of violence. The facts, shortly, were that D. had intervened in a dispute between a landlady of lodgings and a man who was attempting to leave without paying his rent. In the course of the dispute, during which the defaulting lodger threatened D., D. fired a shot from a revolver into a hold-all which the lodger was carrying. Thereupon, the lodger advanced upon D. who threw the revolver at him, with the result that his face received wounds requiring ten stitches. D. applied to the Court of Criminal Appeal for leave to appeal against his sentence. It was contended on behalf of D. that the learned Recorder appeared to have suited the punishment to the major offences, although a plea of guilty to the minor offence had been accepted.

*Held*, treating the application as the appeal, that the sentence was too severe. Once the two very serious charges were withdrawn there remained only the fact that, during the course of the dispute, D. had hurled a heavy metallic object at the other man. In those circumstances, and bearing in mind that D. had no previous convictions and was apparently a man who lived peaceably with his neighbours, the sentence would be reduced from three years to eighteen months' imprisonment. [H. P.]

COMMENTARY. The maximum sentence for shooting with intent to do grievous bodily harm and wounding with intent to do grievous bodily harm is imprisonment for life, and that for unlawful wounding, imprisonment for five years.

See Archbold, 33rd ed., 1000, 1006.

**Shops**—*Service on a Sunday—sale of raw kipper*

NEWBERRY *v.* COHEN'S (SMOKED SALMON) [20] (Q.B. Divisional Court: Lord Goddard C.J., Cassels and Donovan JJ.: April 26, 1956) (*The Times*, April 27, 1956).

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[19] For the applicant: *J. F. F. Platts-Mills* (instructed by Patrick Johnson & Co.). The Crown was not represented.

[20] For the prosecutor: *Paul Wrightson* (instructed by J. G. Barr). For the shopkeeper: *Aron Owen* (instructed by Gale & Phelps).

A shopkeeper was charged with serving a customer with kippers on a Sunday contrary to section 47 of the Shops Act, 1950. The shopkeeper contended that whether they needed further cooking or preparation after purchase or not such kippers were " meals or refreshments " within the meaning of the Fifth Schedule of the Act and that the case fell within *London County Council* v. *Lees* [1939] 1 All E.R. 191, and *Binns* v. *Wardale* [1946] K.B. 451. It was contended by the prosecutor that any food which was not at the time of sale ready for immediate consumption and which required further preparation was not within the words " meals or refreshments." The magistrate was of opinion [1956] Crim.L.R. 344, that on the authority of *Binns* v. *Wardale* (*supra*) whether they needed further preparation or not, such kippers came within the meaning of " meals or refreshments," and dismissed the information. On appeal by the prosecutor:—

*Held*, dismissing the appeal, that it was impossible to say that a kipper could not be a meal or refreshment. Although what was bought need not be consumed on the premises, one test was whether or not an article might be consumed equally well in the shop or at home. [J. D. P.]

COMMENTARY. The provisions of the Shops Act, 1950, with regard to the sale of food on Sunday have caused much difficulty and this case shows the absurdities to which they may lead.

A second appeal, *Newberry* v. *Adelson,* was heard at the same time as that reported above. In this case a shopkeeper had sold a packet of tea and a packet of matzo meal on Sunday. The Divisional Court held that things used in cooking such as these could not be regarded as a meal or refreshment. Some things, however, may be used equally well as a meal or refreshment or in cooking.

See Stone, 88th ed., 2243, 2261.

**Suicide**—*Application to quash verdict of.* See *Re* LAWRENCE, p. 410, above.

**Sunday**—*Place of entertainment—enclosure in a public park*

CULLEY *v.* HARRISON [21] (Q.B. Divisional Court: Lord Goddard C.J., Cassels and Donovan JJ.: April 25, 1956) ([1956] 3 W.L.R. 21; [1956] 2 All E.R. 254).

On a certain Sunday a form of public entertainment known as a motor-cycle scramble was held in an enclosure in a public park, for admission to which a charge was made. On an appeal by the organisers of the scramble from their conviction under section 1 of the Sunday Observance Act, 1780, it was contended that the word " place " in section 1 connoted some form of structure and could not include an open park.

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[21] For the defendants: *Norman Skelhorn Q.C., B. H. Gerrard* (instructed by A. J. A. Hanhart for A. S. Coupe, Lowe & Co., Rochdale). For the prosecutor: *Richard Elwes Q.C., John Hobson* (instructed by Vizard, Oldham & Co.).

*Held*, dismissing the appeal, that " place " was wider than " any house or room " which were specifically mentioned in the section and included entertainment outside a building.

*Per* Lord Goddard C.J.: If the court were to say that what had been done in the present case was not an offence, it would follow that every racecourse in the country, providing that it closed its buildings, could open on a Sunday. [J. D. P.]

COMMENTARY. In *Terry* v. *Brighton Aquarium Company* (1875) L.R. 10 Q.B. 306, a building, the chief part of which was used as an aquarium, with its garden and terrace, was held to be a place of entertainment and amusement within the Sunday Observance Act, 1780.

For the purposes of the Betting Act, 1853, s. 1, which provides that " no house, office, room or other place " shall be used for the purpose of betting, a magistrates' court has held a car to be a place: *R.* v. *Hunt and Scriven* [1954] Crim.L.R. 714. In *Brown* v. *Patch* [1899] 1 Q.B. 892, a case decided under that section, Channell J. said: " The important question is not so much, what is a place? but what is the character of the user of it? . . . the analogy is with respect to the way the place is used rather than with respect to the way in which it is constructed."

**Sunday**—*Service in shop.* See NEWBERRY *v.* COHEN'S (SMOKED SALMON), p. 426, above.

**Unlawful Wounding**—*Sentence.* See R. *v.* DENNYS, p. 426, above.

# Acts and Orders

## Agriculture

AGRICULTURE (POISONOUS SUBSTANCES) REGULATIONS, 1956 (S.I. No. 445): operative March 31, 1956. The Regulations of 1955 (S.I. No. 632; [1955] Crim.L.R. 439) are revoked and replaced with certain amendments. Protective clothing must be worn when any mixture of 2-ethylthioethyl dimethyl phosphorothionate and S-(2-ethylthioethyl) dimethyl phosphorothiolate or any organo-mercury compound is released from an aerosol dispenser in a greenhouse. Soil application is redefined to mean the process whereby a specified substance is discharged or released in unbroken liquid form directly on to or into the soil for absorption by the roots of plants. The requirements as to the protective clothing to be worn when this process is used otherwise than in a greenhouse are modified.

For penalties for contraventions, see section 4 of the Agriculture (Poisonous Substances) Act, 1952.

### Aliens

ALIENS (APPROVED PORTS) (NO. 2) ORDER, 1956 (S.I. No. 479): operative April 1, 1956. Bovingdon is no longer an approved port for the purposes of the Aliens Order, 1953 (S.I. No. 1671 ; [1954] Crim.L.R. 68).

### Armed Forces

CERTIFICATES OF ARREST AND SURRENDER OF DESERTERS AND ABSENTEES (AIR FORCE) REGULATIONS, 1956 (S.I. No. 580): operative January 1, 1957. The certificates to be handed over when an absentee or deserter from the regular air force is delivered into air force custody are prescribed. There are two forms of certificate, one where the absentee or deserter is given into such custody as a result of proceedings in a court of summary jurisdiction and one where he has surrendered himself to the police.

FIELD PUNISHMENT RULES, 1956, AIR FORCE (S.I. No. 560); ARMY (S.I. No. 561): both operative January 1, 1957. The nature of field punishment and the places where it may be carried out are prescribed. A person who has been awarded field punishment may only be put under restraint by handcuffs to prevent his escape or to protect himself or others from injury. He may not be kept continuously under such restraint for more than twenty-four hours and the handcuffs may not be placed with the hands of the offender behind his body unless it is necessary because of his violence.

BOARD OF INQUIRY RULES, 1956, AIR FORCE (S.I. No. 579); ARMY (S.I. No. 630): both operative January 1, 1957. These Rules regulate inquiries before boards of inquiry set up under section 135 of the Army Act, 1955, and of the Air Force Act, 1955. They prescribe the duties of the boards, the matters of reference to them, the deferring and staying of proceedings, the convening of such boards, their constitution, assembly and procedure, evidence, record of proceedings and entries of reports in service books.

### Birds

WILD BIRDS (OYSTER-CATCHERS) (NO. 2) ORDER, 1956 (S.I. No. 500): operative April 16, 1956. In two coastal areas of Norfolk defined in the Schedule to the Order oyster-catchers are added to the list of birds contained in Schedule 2 of the Protection of Birds Act, 1954 (see [1954] Crim.L.R. 638). These birds may be killed or taken and their nests or eggs seized by the owner or occupier of the land where the action is taken, persons authorised by them or by certain public bodies.

### British Commonwealth

EMERGENCY POWERS (NIGERIA) ORDER IN COUNCIL, 1956 (S.I. No. 616): operative May 1, 1956. Powers under the Emergency Powers Order in Council, 1939, formerly exercisable by the Governor of Nigeria are now exercisable by the Governor-General.

### Civil Aviation

COLONIAL AIR NAVIGATION (AMENDMENT) ORDER, 1956 (S.I. No. 615): operative July 1, 1956. The Order of 1955 (S.I. No. 711; [1955] Crim.L.R. 443) is amended. The principal change is that a simplified document may be used instead of the journey log-book. Other amendments concern the carriage of such a document and other documents in aircraft, the performance of experimental and test flights, the height of nationality and registration marks on certain parts of aircraft, the areas in which aerobatic flight is prohibited, flights by night, along a line of landmarks or following a track indicated by a directional radio guide and notification of flight over an area in which search and rescue operations would be difficult.

For penalties for contraventions, see art. 69 of the Order of 1955.

### Defence Regulations

DEFENCE REGULATIONS (ISLE OF MAN) ORDER, 1956 (S.I. No. 621): operative May 1, 1956. The following regulations of the Defence (General) Regulations (Isle of Man), 1939, (S.R. & O. No. 1068) are revoked: 46 (control of trade by sea), 51 (taking possession of land), 63 (killing of rabbits, etc., and game), 66 (delegation of functions), 70 (traffic on highways), 104 (special provisions as to India, Burma and Southern Rhodesia), 85 (1) (*c*) (regulation 85 relates to entry upon and the inspection of land). Regulation 100, which relates to interpretation, is amended.

### Emergency Laws

STRATEGIC GOODS (CONTROL) (AMENDMENT NO. 2) ORDER, 1956 (S.I. No. 577): operative May 4, 1956. The Order of 1954 (S.I.

No. 1622; [1955] Crim.L.R. 123), which prohibits the export of certain goods to prescribed countries now applies to specified crystals, specified magnetometers, lithium metal, ores and compounds, specified apparatus and appliances for use in aircraft, certain components and parts of arms and munitions and specified searchlights. It no longer applies to certain vacuum pumps, specified steel alloy balls, certain magnetic materials and chloropicrin.

For penalties for contraventions, see regulation 92 of the Defence (General) Regulations, 1939.

IRON AND STEEL SCRAP ORDER, 1956 (S.I. No. 631): operative May 4, 1956. The Order of 1954 (S.I. No. 1593; [1955] Crim.L.R. 123), as amended, is revoked and replaced. The principal changes are that the maximum prices of all specifications in the Schedule are increased and holding companies and subsidiaries are included in the definitions of consumers and chemical users of iron and steel scrap.

Current licences granted under the revoked Order continue to have effect as though granted under the new one.

For penalties for contraventions, see regulation 92 of the Defence (General) Regulations, 1939.

COAL DISTRIBUTION (AMENDMENT) ORDER, 1956 (S.I. No. 444): operative April 1, 1956. An occupier of controlled premises who makes a written application to the Local Fuel Overseer, to which the written consent of the new merchant is attached, between April 1 and July 31, 1956, may change his licensed merchant without giving reasons.

COAL DISTRIBUTION (RESTRICTION) DIRECTION, 1956 (S.I. No. 629): operative May 1, 1956. The maximum amounts of coal of different classes which may be furnished or acquired for consumption in controlled premises between May 1, 1956, and April 30, 1957, are specified.

PAPER (USE IN BETTING SCHEMES) (REVOCATION) ORDER, 1956 (S.I. No. 586): operative April 26, 1956. The Order of 1950 (S.I. No. 1112) is revoked. This Order controlled the use of paper for pool and fixed odds betting schemes.

## Employment

NOTIFICATION OF VACANCIES (REVOCATION) ORDER, 1956 (S.I. No. 649): operative May 7, 1956. The Order of 1952 (S.I. No. 136), as amended, which required employers engaging workers to do so through a local office of the Ministry of Labour and National Service or a scheduled employment agency is revoked.

### Hire-Purchase

CONTROL OF HIRING (AMENDMENT) ORDER, 1956 (S.I. No. 626): operative April 27, 1956. In the Order of 1956 (S.I. No. 179; [1956] Crim.L.R. 279) " rental " includes, in relation to any goods, any payment, howsoever payable, made wholly or partly for the possession or use, or possession and use, of the goods. All rentals are ascertainable at the date of the signing of the agreement.

For penalties for contraventions, see regulation 92 of the Defence (General) Regulations, 1939.

### London

The following Orders have been made detailing prescribed routes: S.I. 1956, Nos. 588 (St. Marylebone); 589 (Heston and Isleworth and Twickenham).

### Medicine

DENTISTS ACT, 1956 (APPOINTED DAY) ORDER, 1956 (S.I. No. 624): operative April 24, 1956. The Dentists Act, 1956 ([1956] Crim.L.R. 351) comes into force on July 4, 1956.

### Merchant Shipping

MERCHANT SHIPPING (LIFE-SAVING APPLIANCES) (AMENDMENT) RULES, 1956 (S.I. No. 645): operative October 1, 1956. The Rules of 1952 (S.I. No. 1949), are amended. The principal changes are (1) certain fishing boats of fifty feet in length or over with fewer than thirteen persons on board are required to carry at least one inflatable life-raft of sufficient aggregate capacity to accommodate all the persons on board; such boats carrying thirteen or more persons must carry at least two such rafts; (2) all such fishing boats of under fifty feet in length, but not under forty feet are required to carry buoyant apparatus or inflatable life-rafts of sufficient aggregate capacity to accommodate everyone on board; (3) all fishing boats of under a hundred and forty-five feet, but not under forty feet, in length which carry one or more inflatable life-rafts in accordance with the Rules are relieved from the requirement of carrying certain provisions in the lifeboats; (4) ships of classes IIA, III, IV, V, VI, VIA and XII may carry inflatable life-rafts instead of buoyant apparatus; (5) the inflatable life-rafts which are required or permitted under the new rules must comply with certain requirements and carry prescribed equipment.

For penalties for contraventions, see section 430 of the Merchant Shipping Act, 1894.

### Pest Control

See IMPORTATION OF RAW VEGETABLES (SCOTLAND) ORDER, below.

### Poisons

See AGRICULTURE (POISONOUS SUBSTANCES) REGULATIONS, p. 428, above.

### Police

ROYAL IRISH CONSTABULARY (WIDOWS' PENSIONS) REGULATIONS, 1956 (S.I. No. 427): operative April 1, 1956. The Regulations of 1954 (S.I. No. 703 ; [1954] Crim.L.R. 646) and 1955 (S.I. No. 529 ; [1955] Crim.L.R. 393) are consolidated. The rate of any pension will be calculated after taking into account any increase payable under any Act whether passed before or after the making of the Regulations.

See POLICE PENSIONS (SCOTLAND) REGULATIONS, p. 434, below.

### Road Traffic

MOTOR VEHICLES (CONSTRUCTION AND USE) (AMENDMENT) REGULATIONS, 1956 (S.I. No. 540): operative June 1, 1956. The Regulations of 1955 (S.I. No. 482; [1955] Crim.L.R. 393) are amended. The overall length of a public service vehicle may not exceed twenty-seven feet if it has four wheels, is a double-decked vehicle and is registered before July 1, 1956, or thirty feet in any other case. In the case of a heavy motor-car or a motor-car which is a public service vehicle the total weight transmitted to the road surface by any two wheels in line transversely may not exceed nine tons, and the sum of the weights so transmitted by all the wheels may not exceed fourteen tons.

For penalties for contraventions see regulation 104 of the Regulations of 1955 and sections 111 and 113 of the Road Traffic Act, 1930.

### Scotland

*Pest control*

IMPORTATION OF RAW VEGETABLES (SCOTLAND) ORDER, 1956 (S.I. No. 407): operative April 1, 1956. The Order of 1955 (S.I. No. 405 ; [1955] Crim.L.R. 327) is modified and subject to conditions similar to those contained in the English Order (see [1956] Crim.L.R. 353) certain raw vegetables may be imported from districts in Belgium, France and the Netherlands, during specified periods. Except so far as they are inconsistent with this Order, the provisions of the Order of 1955 apply to the landing of such raw vegetables.

*Police*

POLICE PENSIONS (SCOTLAND) REGULATIONS, 1956 (S.I. No. 434): operative April 1, 1956. The Regulations of 1955 (S.I. No. 485; [1955] Crim.L.R. 394) are amended, the principal changes relating to a new scheme for widows' ordinary pensions. The rate of contribution of policemen is increased from 5 per cent. to 6¼ per cent., but regular policemen serving on April 1, 1956, are given the choice of continuing to pay contributions at the old rate or paying at the increased rate.

### Sea Fisheries

SEA-FISHING INDUSTRY (FISHING NETS) ORDER, 1956 (S.I. No. 531): operative April 11, 1956. The Order of 1954 (S.I. No. 78) is revoked and replaced. Alterations are made in the prescribed dimensions of nets used by British ships registered in the United Kingdom fishing in certain waters situated north of the parallel of 48 degrees north latitude and east of the meridian of 42 degrees west longitude. The mesh of any net other than a seine net made of a single twine containing no manila or sisal in any part, from April 11, 1956, to April 4, 1957, must be seventy millimetres broad and two millimetres thick, and on and after April 5, 1957, seventy-five millimetres broad and two millimetres thick. The mesh of other nets, other than seine nets, from April 11, 1956, until April 4, 1957, must be seventy-five millimetres broad and two millimetres thick and on and after April 5, 1957, eighty millimetres broad and two millimetres thick.

The mesh of any net must comply with the Order whether the net is wet or dry. Nets carried for fishing for sand eels (Ammodytes) are exempted from its provisions.

For penalties for contraventions, see section 3 (4) of the Sea-Fishing Industry Act, 1933.

# Practical Problems

*All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 3 Chancery Lane, London, W.C.2." The questions of subscribers only are answerable in the Review. All questions should be submitted in duplicate. The Publishers cannot accept any responsibility for the correctness of the replies.*

## 8. *Stealing workmates' pay packets*

A number of men work as a gang on British Railways. They work shifts. When on nights they arrange for one of their number to collect the wages of them all.

Each man signs a bearer slip and the Railway Cashier hands over the wages against the slips. Each man takes it in turn to collect the wages.

This arrangement has worked most excellently until the past week when the ganger who collected the wages absconded with them.

The question is:—"Who is the bailor?" This is important as the railwaymen have received no wages for last week's work and the railway company say that when they handed over the wages against the bearer slips they had no further interest in the money.

Another query arises. What is the offence?

Is the offence fraudulent conversion, using the argument that when the workmate received the money he then became the agent of his colleagues, or is it larceny by a bailee, using the argument that he received specific sums of money to hand over to his colleagues *in specie*, namely, a wage packet bearing a name plus the contents. [A. S.]

### ANSWER

On these facts it seems clear that the absconding ganger is the agent of the men, not of the railway, since the latter handed over the wage packets at the specific request of the men and against their signatures. Thus the railway has completely discharged its obligations in respect of the men's wages and the loss, if the culprit cannot be made to pay up, must fall on the men.

With regard to the criminal offence, undoubtedly the ganger was the bailee of the individual men, since it was his duty to hand over a specific thing, *viz.*, the wage packet with the contents. The appropriate charge is larceny by a bailee, although it is also clear that the culprit is guilty of an offence under section 20 (1) (iv) of the Larceny Act, 1916, since he was " . . . entrusted . . . with . . . property in order that he [might] . . . apply, pay, or deliver, for any purpose or to any person, the property . . ." and has fraudulently converted it to his own use. [D. W. E.]

### 9. *Calling the prosecution's witnesses for the defence*

In a police court near here on a plea of guilty the clerk to the magistrates has asked defendants if they wish any of the witnesses for the prosecution to give evidence. We have taken the view that a defendant has no right to have a witness for the prosecution to be called when in court to give evidence. [H.]

#### ANSWER

Section 13 (3) of the Magistrates' Courts Act, 1952, states: "If the accused pleads guilty, the court may convict him without hearing evidence." This does not prevent the court hearing evidence if it so desires, but the calling of evidence will be at the court's discretion. It may exercise its discretion at the instance of either the prosecution or the defence. The usual practice is only to call prosecution witnesses if something the defendant says in mitigation makes that course advisable as a check on his statement.

[A. E. J.]

### 10. *Police district in which theft is committed*

A, a lorry driver employed by a wholesale potato firm, which is situated in Police District N, was instructed, among other calls, to deliver five sacks of potatoes to a retailer, B, whose premises are situated in another Police District, O. A arrives at the retailer's shop and delivers only four sacks of potatoes, but moves the position of a sack already in the store to make it appear to the retailer that he has in fact delivered five sacks. A then produces a receipt book (property of his employer) made out for delivery of five sacks of potatoes, and the retailer signs as having received this quantity. A later returns to Police District N and sells the sack concerned to a party who is fully aware of the circumstances under which A, the driver, obtained possession of them. The retailer subsequently discovers what has occurred and complains about the matter.

(1) What offence, if any, is committed by A, the lorry driver, in Police District O in respect of the retailer?

(2) In which district does A steal the potatoes? (as *per* section 1, Larceny Act, 1916). [R. A. C.]

### ANSWER

A falsely represented to the retailer B that he had delivered five sacks of potatoes when in fact only four had been so delivered. This false representation B believed and in consequence he parted with a valuable security in the form of an accountable receipt. Therefore A committed false pretences contrary to the Larceny Act, 1916, s. 32.

The offence of larceny by a servant is committed by A in Police District O. Without definite information to the contrary it would appear that the intention to steal was formed by A on his arrival at the retailer's premises, and the means of covering up his theft were made easier by the presence there of other sacks of potatoes. As the sacks of potatoes which A was carrying were in the constructive possession of his employer until delivered to the retailer, the above offence is committed when A drives away from the premises of the retailer. [N. W.]

# *Letters to the Editor*

## Public Mischief

Sir,

Dealing with the subject of statutory provisions relating to the alleged offence of " effecting a public mischief " the learned author of the article " Criminal Law Reform in Northern Ireland " [1956] Crim.L.R. 151, remarks at p. 165 " so far as the present writer is aware, no changes have been introduced in those Australian states with criminal codes."

Western Australia is an Australian state with a Criminal Code, but its legislative provision on this particular subject is contained in its Police Act, 1892–1952. Section 90A of that Act provides:—

1. " Any person who falsely and with knowledge of the falsity of his statements represents to any member of the Police Force that any act has been done or that any circumstances have occurred, which act or circumstance as so represented are such as reasonably call for investigation by the police, shall be guilty of an offence. Penalty—Fifty pounds, or imprisonment for three months."
2. A person so convicted may in addition to any other penalty be ordered to pay a reasonable sum for the expenses of or incidental to any abortive police enquiries occasioned by his false statement. Such sum shall be " paid to the Treasury as public moneys of the State."

Yours faithfully,

TOM HARTREY

Barrister and Solicitor.

*Kalgoorlie, Western Australia.*

# Books and Periodicals

**Reviews:**

*Obscenity and the Law.* By Norman St. John-Stevas. London: Secker & Warburg. 1956. xii and 203 and (appendices and index) 83 pp. (25s. net.)

The law is most vulnerable to criticism when it moves into the field of morals. To prescribe conduct in general terms when that conduct can only be tested by the moral code prevailing at any particular time or in any specific country is certain to be unsatisfactory. Moreover, viewed in historical perspective the moral emphasis changing with the social background is bound to throw up absurdities. From the point of view of the law and the vital need for the public respect for the administration of justice this is unsound. From the point of view of the publisher, author, printer, literary agent and bookseller, all of whom are liable to be prosecuted as the law relating to obscenity now stands, the situation is serious. It is because so many persons, frequently of otherwise impeccable character and repute, are involved that the law relating to this particular field of morals needs to be clear and unfailing in its execution.

The author has very carefully traced the history of the law relating to obscene publications and no one can fail to be astonished, at least in some degree, by the results. Criticism stops short, however, at the point where an alternative method of controlling obscene writings is considered. Here, again, Mr. St. John-Stevas has supplied, in Appendix II, the suggested Bill to amend and consolidate the law relating to obscene publications. Criticisms of the Bill will inevitably be made and these presumably will be directed to the issue that, in the last analysis, it is the effect on the reader with which the law is concerned, not the intent of the person prosecuted. Some persons will always be available to evidence that the work had a corrupting effect on them; but it is society as a whole which is concerned and corruption here is generally no more than a matter of opinion.

The book deals with a matter which is clearly of importance to all the reading public today. The author sets out the relevant facts objectively and calmly. It is up to the public to read the book and to make up its own mind.

T. E. James.

*The Cinematograph Regulations, 1955.* By Leslie Knopp, M.B.E. London: The Cinema Press, Ltd. 1955. 134 and (appendices and index) 51 pp. (21s. net.)

It would seem that in his book Dr. Knopp has set out to provide a manual of law and practice for those concerned with safety in cinemas. The method adopted for discussion of the various aspects of the subject is to print in dark type the Regulations themselves, the explanations from the Home Office in italic, and Dr. Knopp's analyses in light type. The Regulations are grouped according to subject-matter and not in sequence. Decided cases are mentioned without any case-reference being quoted; there is no table of Regulations; cross-reference is rare; and the index is inadequate. In one instance a group of subsections of a Regulation is quoted without mention of the Regulation from which they are detached. Although admirable in approach and valuable for the author's views and recommendations on the Regulations, I believe this book will be a disappointment to members of the legal profession.

D. A. GODWIN SARRE.

## Books Received:

*Reflections on Hanging.* By Arthur Koestler. London: Victor Gollancz, Ltd. 1956. 170 and (appendices, references and index) 23 pp. (12s. 6d. net.)

*Birdman of Alcatraz.* The Story of Robert Stroud. By Thomas E. Gaddis. London: Victor Gollancz, Ltd. 1956. 254 pp. (16s. net.)

*The Trouble With Cops.* By Albert Deutsch. London: Arco Publishers, Ltd. 1955. xii and 233 and (index) 7 pp. (16s. net.)

*Essays on the Law of Evidence.* By Zelman Cowen, Barrister-at-Law, Professor of Public Law in the University of Melbourne, and P. B. Carter, Barrister-at-Law, Fellow of Wadham College, Oxford. Oxford University Press. London: Cumberlege. 1956. xvi and 270 and (index) 8 pp. (35s. net.).

*Daughters of Cain.* By Renée Huggett and Paul Berry. London: George Allen & Unwin, Ltd. 1956. 248 and (bibliography) 4 pp. (18s. net.).

*The River Police.* By Tom Fallon. London: Frederick Muller, Ltd. 1956. 263 pp. (16s. net.).

*Delinquent Boys.* The Culture of the Gang. By Albert K. Cohen. London: Routledge & Kegan Paul, Ltd. 1956. 179 and (notes and index) 21 pp. (21s. net.)

*Crime and Social Action.* By George Godwin. London: Watts & Co. 1956. vi and 268 and (bibliography and index) 8 pp. (18s. net.)

*Police Headquarters.* By Quentin Reynolds. London: Cassell & Co., Ltd. 1956. 339 pp. (18s. net.)

*Judicial Interpretations of the South African Criminal Procedure Acts (1917–1955).* By Charles W. H. Lansdown, B.A., LL.D., and E. F. Van der Riet, B.A., Barrister-at-Law, Judge of the Supreme Court of South Africa, assisted by G. N. Dock, M.A., Barrister-at-Law. Cape Town: Juta & Co., Ltd. London: Sweet & Maxwell, Ltd. 1956. xix and 511 and (index) 70 pp. (£5 14s. net.)

*Borstal and Better.* By Richard P. Maxwell. London: Hollis & Carter. 1956. 216 pp. (16s. net.)

*Stone's Justices' Manual.* Eighty-eighth edition. By James Whiteside, Solicitor, Clerk to the Justices, and J. P. Wilson, Solicitor, Clerk to the Justices. London: Butterworth & Co. (Publishers), Ltd.; Shaw & Sons, Ltd. 1956. Vol. 1, cccxxvii and 1,342 and (index) 223 pp.; Vol. 2, vii and 1,676 and (index) 223 pp. (Thin edition, 84s. 6d. net; thick edition, 79s. 6d. net.)

**Reader's Digest:**

*Larceny and mistake*: Mr. T. A. Kent agrees with the decision in *Moynes* v. *Coopper* [1956] Crim.L.R. 268, but, examining the authorities, criticises the reasoning of the judgments: 106 *Law Journal* 259.

*Evidence*: Mr. Joseph Yahuda compares circumstantial evidence in certain criminal cases with the rule of *res ipsa loquitur* in civil cases: 106 *Law Journal* 230.

*Children*: The unreliability of evidence given by children and adolescents concerning sexual offences is considered in the *International Criminal Police Review*, March, 1956, at p. 66.

*Miscarriage of justice*: It is advocated that a man wrongfully convicted should be able to reopen his case in the courts in a manner similar to that found in France and other countries: 221 *Law Times* 199.

*Costs*: It is argued that costs should only be awarded against the prosecution in cases where the charge ought never to have been made: 100 *Solicitors' Journal* 255.

*Forgery*: The use of fingerprints as signatures to documents to prevent forgery is one of the matters dealt with in an article considering several aspects of this offence: *International Criminal Police Review*, March, 1956, at p. 72.

*Prisons*: Some interesting observations on the rehabilitation of prisoners and the social structure of prisons are made in two articles in the *Journal of Criminal Law, Criminology and Police Science*, January–February, 1956, at pp. 632, 648.

*Police*: The powers of policemen to eject persons from premises or public vehicles are examined in the *Police Review*, April 13, 1956, at p. 256.

*Police*: Earlier entitlement to maximum pay and alterations in the present shift system are suggested as two ways of solving the police manpower problem: *Police Review*, April 6, 1956, at p. 236.

*Food and drugs*: Their application to horseflesh and the precautions against contamination are two special aspects of the new food hygiene regulations considered at 120 *Justice of the Peace* 224.

*Landlord and tenant*: Two criminal cases affecting landlords and their tenants, *R.* v. *Silver* [1956] Crim.L.R. 338 and *R.* v. *Breed* [1956] Crim.L.R. 199, are considered briefly at 100 *Solicitors' Journal* 293.

*Probation*: Mr. Gilbert Paull, Q.C., indicates the duty of a probation officer to the court in *Probation*, March, 1956, at p. 1.

# THE
# CRIMINAL LAW REVIEW

*Editors*

JOHN BURKE and PETER ALLSOP, M.A.

*Barristers-at-Law*

## *Editorial*

**Profit from murder**

A person may not take any benefit arising out of a death brought about by his felonious act, whether it was a case of murder or manslaughter. But in *Re Callaway*,[1] a case heard on May 16, 1956, Vaisey J. had to consider the more difficult question whether a brother could profit from his sister's crime. Mrs. Callaway made a will leaving her entire estate to her daughter. The mother and daughter died in circumstances suggesting that the daughter murdered her mother and committed suicide. Mrs. Callaway's only other child, a son, claimed the whole of his mother's estate, but the Crown disputed this claim and argued that half Mrs. Callaway's estate, namely, the half which would in normal circumstances have passed on intestacy to the daughter, should pass to the Crown as *bona vacantia*. The rule that a person may not profit from his crime did no more than exclude the culprit and could not create any new interests, so that nobody was entitled to the forfeited interest which therefore went to the Crown as *bona vacantia*. Although it seemed to Vaisey J. illogical that the son should take the whole estate and profit from his sister's crime, frustrating his mother's testamentary intentions, yet he held that as the law stood the son was beneficially entitled to the estate to the exclusion of any interest of the Crown.

Another action concerning the estate of a murdered woman, *In the Estate of Ricketts*,[2] was settled. By her will Mrs.

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[1] *The Times*, May 17, 1956.
[2] *The Times*, June 7, 1956.

Ricketts left the whole of her estate to Mr. and Mrs. Merrifield. They were both charged with her murder and Mrs. Merrifield was found guilty and executed in September, 1953. The jury failed to agree in the case of Mr. Merrifield and later a *nolle prosequi* was entered. Under the terms of the settlement the estate is to be divided, five-sixths going to the daughters of Mrs. Ricketts and one-sixth to Mr. Merrifield.

### Tape recording used as evidence

At Wiltshire Assizes on May 10, Hilbery J., hearing charges against two men of conspiracy to pervert the course of justice, ruled that a tape-recording of a conversation which took place at Salisbury police station could be admitted as evidence. He allowed it on the ground that it was a first-class mechanical reproduction and therefore might be said to be the best evidence, in the circumstances, of the conversation. After the recording had been played there was some argument as to whether the transcript of the recording should be admitted. The judge ruled that copies of the transcript should be given to the jury to assist them, and after this had been done the recording was played again. Hilbery J. commented: "I don't know why we have got to have these new departures. We have always got on very well, especially with police officers who make notes at times or immediately afterwards, of long conversations which were vital to the matter. I don't know why it is supposed we should now go in for tape recording. But here it is, we have it now." The two defendants were acquitted.[3]

Readers of the *Criminal Law Review* may remember an article we published by Mr. T. B. Radley ([1954] Crim.L.R. 96) in which the use of recordings by the police was considered.

### The police and children

The experiment tried by the Liverpool City Police of using special juvenile liaison officers to prevent juvenile crime has become rightly famous. The force has now published a small pamphlet, entitled "The Police and Children," which describes the purposes and effect of the scheme. In his foreword the Chief Constable says that the results so far have been most encouraging and he believes that as a long-term policy the scheme will be responsible for a considerable reduction of adult crime in years to come.

Mr. F. J. Odgers described the Liverpool scheme in an article at [1955] Crim.L.R. 173.

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[3] See *The Times*, May 11, 1956.

### Scottish reports

The Criminal Statistics for Scotland, 1955 (Cmd. 9750) show an increase of 2,830 in the total number of crimes and offences made known to the police in 1955 as compared with the total made known in 1954. There was a decrease in the number of crimes against the person, less housebreaking, but more theft and robbery. There was a further disturbing increase of 253 in the number of cases of being drunk in charge of a vehicle. Of all crimes and offences made known to the police 75·8 per cent. were cleared up as compared with 75·4 per cent. in 1954.

The Report on Prisons in Scotland for the year 1955 (Cmd. 9760) has also been published. During the year 12,333 men and women were admitted to prison and Borstal institutions, 618 fewer than in 1954. The average daily population, however, was 2,176, which is the highest since 1914. The Report contains some interesting information concerning young offenders, the employment and training of prisoners and Borstal inmates and after care.

### Food hygiene

The Food Hygiene Regulations, 1955 (S.I. No. 1906; [1956] Crim.L.R. 133) came into force in January and recent newspaper reports indicate that those responsible for the enforcement of these regulations have not been idle. At Hackney three fishmongers were summoned for allowing newspaper to come into contact with fish sold from stalls and were each fined £5. At Acton the manager of a grocery shop was fined a total of £6 after pleading guilty to two summonses for smoking a pipe in his shop while standing by a counter on which there was uncovered bacon and cheese. In a letter in *The Times* after this case had been reported the question was raised whether a customer in a shop could be fined for smoking near uncovered food. The relevant regulation provides: "A person who engages in the handling of food shall while so engaged . . . refrain from the use of tobacco (including snuff) while he is handling any open food or is in any food room in which there is open food." For the purposes of the regulations a person is deemed to engage in the handling of food if for the purpose of a food business he carries out or assists in the carrying out of any process or operation in the sale of food or in the preparation, transport, storage, packaging, wrapping, exposure for sale, service or delivery of food.

### Lottery tickets

Two partners printed and distributed tickets for use in lotteries, the tickets being such that they could be adapted by their purchasers for use in relation to any lottery. The partners were summoned for offences under section 22 of the Betting and Lotteries Act, 1934, and in their defence it was argued that since the tickets had not been printed for a specific unlawful lottery, but might be used quite lawfully, no offence had been committed. Counsel drew the analogy of a pack of playing cards which might be used for gaming in the street. In such a case could the printers be held liable?

Mr. Davis, the Metropolitan Magistrate, convicted both the defendants. He rejected the analogy of the misused playing cards because such cards are not on the face of it illegal. "The raison d'être of these tickets is for use in a lottery. . . . The Betting and Lotteries Act makes all lotteries unlawful with the exception of those which the Act itself excludes. You are therefore put on notice that you must be assured before selling lottery tickets that they are to be used in a lawful manner."[4]

### Metropolitan Police

Mr. Joseph Simpson is to succeed Sir Ronald Howe, who is retiring from the post of Deputy Commissioner of the Metropolitan Police in January.

### Parliament

#### *Sir Roger Casement*

The publication of certain papers belonging to Sir Roger Casement and now believed to be preserved in the Black Museum of Scotland Yard has been advocated for many years. This question was raised in a debate on the adjournment recently. Mr. W. F. Deedes replying to the debate pointed out that Home Secretaries of both parties have consistently refused to give any information to anyone concerning the Casement papers. This is in accordance with the normal practice of not disclosing official papers until a considerable time has elapsed. The practice now is to deposit papers in the Public Record Office after fifty years and those on capital cases are not open to inspection. Mr. Deedes pointed out the necessity of protecting a man who had been a prisoner, particularly where he has paid the extreme penalty. It might well be that by publishing the diaries the Home Office would be giving from official sources information detrimental to the character of a former prisoner (H.C. Debates, Vol. 552, cols. 755 *et seq.*; May 3, 1956).

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[4] See 20 *Journal of Criminal Law* 117.

*Departmental Committee.*

The Home Secretary does not know yet when the report of the Departmental Committee on homosexuality and prostitution will be published. No more written evidence will be received by the committee after August 31, but certain oral evidence will be called for again (Vol. 552, col. 592; May 3, 1956).

*Murder*

The number of suspected murders which came to the knowledge of the police in England and Wales during March and April were 17 and 12 respectively. The figure for April is the lowest since 1952. Last year the number of suspected murders was 22 in March and 15 in April (Vol. 552, col. *190*; May 17, 1956).

*Prisons*

The Prisons Vote for 1956–1957 includes provision for the completion of new office acommodation for the staff at Wormwood Scrubs, North Sea Camp, Exeter and Wandsworth. It has been recognised since 1953 that extensive renovation is needed in the offices at Dartmoor. One office has been done. The female clerical staff at Wormwood Scrubs, who have been using cell accommodation for their work will very shortly be moving into new offices (Vol. 552, col. *189*; May 17, 1956).

*Subscribers and others are invited to submit for publication articles and letters on matters of interest within the scope of this Review. They should be sent to the* EDITOR, *Criminal Law Review,* 3 CHANCERY LANE, LONDON, W.C.2. *Every effort will be made to return drafts or unsuitable copy but no guarantee can be given in this respect.*

*Books for review should be sent to the Publishers at the above address.*

# The Criminal Law and the Woman Seducer

By A. N. Mackesy, ll.b.

## Introduction

A woman who induces a boy under the age of sixteen to have intercourse with her is not thereby guilty of any criminal offence. " Zeal against immorality is natural and commendable, but it is quite misplaced in any effort to bring an act quite without the criminal law within its penalties " (*Menary* (1911) 23 Ont.L.R. 323, 326, *per* Meredith J.A.); and " the fact that " an accused person who has behaved indecently with a child " will be held up to execration by every decent-minded person in the world is all the more reason why the court has to be careful that it does not find that a criminal offence has been committed if the circumstances do not bring the " accused " within the criminal law, however much one may regret that they do not " (*D. P. P.* v. *Rogers* (1953) 37 Cr. App.R. 137, 138, *per* Lord Goddard C.J.).

Carnal knowledge of a woman without her consent (*i.e.*, rape) has been a criminal offence since pre-Conquest times. Since the thirteenth century it has been a criminal offence for a man to have carnal knowledge of a girl under the age of twelve even with her consent (Statute of Westminster, 13 Edw. 1, c. 13: see Russell on *Crime*, 10th ed., p. 815, n. 79); and now, by the Criminal Law Amendment Act, 1885, carnal knowledge of a girl below the age of thirteen is a felony (s. 4) and carnal knowledge of a girl above the age of thirteen and below the age of sixteen is a misdemeanour (s. 5). It is still not a criminal offence *ipso facto* for a woman to seduce a boy under the age of sixteen; " the law," wrote the late Sir William Norwood East, " has been more occupied with protecting women and girls from men than men and boys from women " (1 *Journal of Criminal Science* (1948), p. 62). But when it was discovered that the Criminal Law Amendment Act, 1922, made it possible to charge the man who had carnal knowledge of the consenting girl not only with carnal knowledge but also with indecently assaulting the girl (on the latter charge bona fide belief on reasonable grounds that the girl was over sixteen can never be a defence: *Forde* [1923] 2 K.B. 400; *Maughan* (1934) 24 Cr.App. R. 130), prosecuting authorities began to charge the woman who had connection with the consenting boy with indecently assaulting the boy. It is convenient to begin this study by mentioning the enactment under which such prosecutions were brought.

## I. The Offences against the Person Act, 1861: the Criminal Law Amendment Act, 1922

Section 61 of the Offences against the Person Act, 1861, deals with "the abominable crime of buggery" and by section 62 (as amended by the Criminal Justice Act, 1948):—

> "Whosoever shall attempt to commit the said abominable crime, or shall be guilty of any assault with intent to commit the same, or of any indecent assault upon any male person, shall be guilty of a misdemeanour, and being convicted thereof shall be liable . . . to be imprisoned for any term not exceeding ten years."

The third part of this section (which concerns indecent assaults upon males) must be read in conjunction with section 1 of the Criminal Law Amendment Act, 1922, which provides:—

> "It shall be no defence to a charge or indictment for an indecent assault on a child or young person under the age of sixteen to prove that he or she consented to the act of indecency."

(This section replaces section 2 of the Criminal Law Amendment Act, 1880, under which the age was thirteen.)

Two questions may now be posed:—

1. Can a woman be charged under section 62 with an indecent assault on a male person? If so,
2. In what circumstances, if at all, will a woman who seduces a boy under the age of sixteen be guilty of an indecent assault as a result of section 1 of the Criminal Law Amendment Act, 1922?

The former question was answered in the affirmative in *Hare* [1934] 1 K.B. 354, where a woman was convicted on an indictment charging her with having indecently assaulted a boy of twelve by having "instigated and induced" him to have connection with her (whereby he caught a venereal disease). The Court of Criminal Appeal (Lord Hewart C.J., Avory and Lawrence JJ.) upheld the conviction and rejected the submission that the words "Whosoever . . . shall be guilty . . . of any indecent assault" in section 62 do not include a woman. The appellant's counsel argued that section 62 was intended to deal only with sodomitical crimes, especially as the maximum penalty under section 62 was ten years' penal servitude (now ten years' imprisonment by virtue of the Criminal Justice

Act, 1948) whereas the maximum penalty for an indecent assault upon a female, under section 52, was only two years' imprisonment. The Court of Criminal Appeal held, however, at p. 356, that:—

> "Having regard to the fact that the word 'Whosoever' in section 61 admittedly includes a woman and that the first part of section 62 admittedly includes a woman, there is no reason for saying that the phrase: 'Whosoever . . . shall be guilty . . . of any indecent assault,' does not include a woman."

In passing, it may be noted that the court also took the opportunity of pointing out that a woman can be guilty of indecently assaulting another female under section 52, a conclusion which Lopes J. had reached in *Armstrong* (1885) 49 J.P. 745. Since it would be no defence for a woman charged with having indecently assaulted a girl under sixteen to prove that the girl consented to the act of indecency, it follows that lesbianism is to some extent punishable in English law; this is often overlooked.

Once it is established that a woman can commit an indecent assault upon a male person, the second question arises: In what circumstances will a woman who seduces a boy under sixteen be guilty of an indecent assault as a result of section 1 of the Criminal Law Amendment Act, 1922? In *Hare*, however, the court was not asked to consider this further question. Avory J., delivering the court's judgment, said, at p. 355:—

> "The boy, being under the age of sixteen, was by law incompetent to consent to any such conduct as took place between him and the appellant. There is no question that the nature of that which took place between them was indecent. The whole question is, as has been concisely put by the counsel for the appellant, whether the offence under section 62 is to be limited to an indecent assault of a sodomitical character."

The statement that the boy was by law incompetent to consent to the indecent conduct is undoubtedly correct because the indictment was for indecent assault and accordingly section 1 of the Criminal Law Amendment Act, 1922, applied; but to say that the whole question turned upon the scope of section 62 presupposes that all the other elements of indecent assault were necessarily comprised in the woman's conduct. The Criminal Law Amendment Act, 1922, s. 1, negatives only one defence which might otherwise be open to a person accused of indecent assault upon a child: it does not negative all the possible defences. It "does not create a new offence. It deprives the defendant of what would have been a defence to an indictment for the committal of the indecent assault" (*Stephenson* [1912] 3 K.B. 341, 344).

In *Hare*, therefore, the Court of Criminal Appeal did not answer the second question. In order to answer it, it is proposed to consider the meaning of "assault," the meaning of "indecent assault" and the effect of section 1 of the Criminal Law Amendment Act, 1922.

## II. The Meaning of "Assault"

### *Battery*

A battery is the intentional application of unlawful force to another's person.

### *Assault*

Archbold still follows the traditional description of assault, based on 1 Hawkins P.C. 62, by defining it as "an attempt to commit a forcible crime against the person of another; such as an attempt to commit a battery, murder, robbery, rape, etc." (33rd ed., p. 991). Mr. J. W. C. Turner, on the other hand, maintains that the crime of assault is a complete crime, not an inchoate (or preliminary) crime such as an attempt, and has suggested the following definition:—

> "It is an assault at Common Law when any person intentionally, or recklessly, by active conduct threatens to apply unlawful physical force to the person of another in such a manner as to create in the mind of that other a belief that such force is about to be so applied" (*Modern Approach to Criminal Law*, p. 355—*cf.* Russell on *Crime*, 10th ed., p. 724; Kenny's *Outlines of Criminal Law*, 16th ed., p. 165: both edited by Turner).

A similar controversy exists in the United States (see 29 N.Y.U.L.R. (1954), p. 220).

According to the traditional view every battery includes an assault: but according to Mr. Turner's definition a battery may be committed without an assault, *e.g.*, if a man were to strike another from behind or while the other is asleep, this would constitute a battery but not an assault, for the victim had no belief that force was about to be applied to him.

### *"Assault" often means "battery"*

Although technically an assault differs from a battery (*cf. Jones* v. *Sherwood* [1942] 1 K.B. 127), in popular language and even in lawyer's language the word "assault" is often used in the sense of "battery"; and in section 62 of the Offences against the Person Act the term "indecent assault" clearly includes:—

(a) an indecent " assault " in the technical sense, *i.e.*, without battery. Thus in *Rolfe* (1952) 36 Cr.App.R. 4, where the indictment was for indecent assault on a woman (under section 52), Lord Goddard C.J. observed, at p. 6, that " an assault can be committed without touching a person. One always thinks of an assault as the giving of a blow to somebody, but that is not necessary. An assault may be constituted by a threat or a hostile act committed towards a person, and if a man indecently exposes himself and walks towards a woman with his person exposed and makes an indecent suggestion to her that, in the opinion of this court, can amount to an assault." *Quaere* whether the expression " a threat or a hostile act committed towards a person " means that the accused must cause the victim to believe that unlawful force is about to be applied. *Fissington* v. *Hutchinson* (1866) 15 L.T. 390, a civil case, seems to be at variance with *Rolfe*;

(b) an indecent " assault and battery ";

and, if Mr. Turner's definition of " assault " is accepted,

(c) an indecent " battery " without an " assault " (for otherwise, if a person committed an indecent battery upon another unawares, this would not be an indecent assault, for the victim would have no belief that unlawful force was about to be applied—*cf. Lock* (1872) L.R. 2 C.C.R. 10, where a conviction for indecent assault was upheld although the victims were too young to know that unlawful force was being applied to them. If the traditional view that every battery includes an assault is accepted, there is no difficulty).

### *The meaning of " unlawful "*

Whether an application or threatened application of force is unlawful depends largely on general principles of the criminal law: generally:—

(a) If the other does not consent, the force is unlawful, unless it is used to inflict lawful correction, to resist unlawful force, to prevent a breach of the peace, to execute judicial process, or as a matter of necessity (see Russell on *Crime*, 10th ed., pp. 729–766; Glanville Williams, *Criminal Law—The General Part*, pp. 572–575).

(b) If the other consents the force is lawful, unless either:

(i) the force involves a breach of the peace (*Coney* (1882) 8 Q.B.D. 534) or is intended and likely to cause bodily harm and is not inflicted in the course of a friendly athletic contest or in the course of "rough but innocent horseplay" (*Donovan* [1934] 2 K.B. 498: *cf. Bravery* v. *Bravery* [1954] Crim.L.R. 785); or

(ii) the charge is for indecent assault upon a person under the age of sixteen. In this case section 1 of the Criminal Law Amendment Act, 1922 (above, p. 447), may apply; or

(iii) the charge is for indecent assault upon a mental defective. The Mental Deficiency Act, 1913, s. 56 (3), provides that "no consent shall be any defence in any proceedings for an indecent assault upon any defective, if the accused knew or had reason to suspect that the person in respect of whom the offence was committed was a defective."

Apart from these three cases consent is a defence to a charge even of indecent assault (*Wollaston* (1872) 12 Cox C.C. 180; *cf.* the American case *McDermett* (1953) 29 N.Y.U.L.R., p. 144, where a conviction for indecent assault upon a police officer was reversed because in his zeal to build up a case the officer had consented to the alleged indecent assault). See the criticism of the law by Hughes in 103 L.J. 116, 117: "The question whether consent is a defence to an alleged indecent assault should be judged by a broad standard of public policy and not on the narrow ground of likelihood of bodily harm. For . . . in the last resort it is always by the standard of public policy that the validity of consent as a defence in the criminal law is measured" (and *cf.* 33 Can.B.Rev., p. 88, and 119 J.P., p. 392).

### *The doctrine of the hostile act*

Except in those cases of assault and battery involving a breach of the peace or intended and likely to cause bodily harm, where consent is no defence, unless the accused committed the act with a "hostile" intention, he cannot be convicted of assault or battery. "The least touching of another *in anger* is a battery" (*Cole* v. *Turner* (1704) 6 Mod. 149): but, as Lord Hardwicke C.J. observed in *Williams* v. *Jones* (1736) Cas.T.Hard. 299, 301, "every laying on of hands is not a battery; for the party's intention must be considered: for people will sometimes by way of joke, or in friendship, clap a man on the back; and it would be ridiculous to say, that in every such case a man must justify, and may not plead not guilty." Thus, where "the plaintiff with his elbow puncht the defendant," this, " if done in earnest discourse, and not with intent of violence, is no assault " (*Turbervell* v. *Savadge* (1669) 2 Keb. 545). This requirement that the act must be done with a " hostile " intention may be called " the doctrine of the hostile act." The *locus classicus* of the doctrine is the civil case of *Coward* v. *Baddeley* (1859) 4 H. & N. 478, where the defendant was trying to extinguish a fire by playing on it with a hose; the plaintiff, a bystander, thought the hose should be directed elsewhere and touched the defendant on the shoulder to attract his attention, whereupon the defendant gave him into custody. The Court of Exchequer held that unless the plaintiff had a " hostile " intention he had not committed a battery and consequently the defendant was unjustified in giving him into custody. The expression " hostile intention," in this context, seems to mean at least this: an intention to do the act without lawful excuse and with knowledge that the other will not consent to it. At any rate, the doctrine of the hostile act clearly does not apply to the type of assault involving a breach of the peace or intended and likely to cause bodily harm where consent is no defence; and it is submitted that it can have no application to a charge of indecent assault on a person under the age of sixteen (where is it " no defence to prove that he or she consented to the act of indecency ": see p. 447, above).

### *The meaning of " force " : assault and battery cannot be committed passively*

The expression " application or threatened application of force to the person of another " means the creation of, or threat to create, an impact between the other's person (or his clothing: *Day* (1845) 1 Cox C.C. 207) and some other matter; and on a charge of battery or of assault it must be established that the accused had created or threatened to create such an impact. Thus in the civil case *Innis* v. *Wylie* (1844) 1 C. & K. 257, where the plaintiff had been unlawfully prevented from entering club premises by a policeman, Lord Denman C.J. directed the jury as follows (p. 263):—

> " You will say, whether, on the evidence, you think that the policeman committed an assault on the plaintiff, or was merely passive. If the policeman was entirely passive like a door or a wall put to prevent the plaintiff from entering the room, and simply obstructing the entrance of the plaintiff, no assault has been committed. . . . The question is, did the policeman take any active measures to prevent the plaintiff from entering the room, or did he stand in the doorway passive, and not move at all."

*Assault and battery committed indirectly*

Usually the impact, or threatened impact, which is necessary to constitute a battery, or an assault, is occasioned by the movement of some object against, or towards, the victim, as where the criminal strikes the victim with his fist or with a stick; but this is not necessary. A battery may be committed if the impact is occasioned by the movement of the victim himself against some stationary matter, provided that the accused has intentionally caused that impact, " as where a person digs a pitfall for another " (*Abrahams* [1918] South Africa C.P.D. 590, 593, *per* Gardiner J.). or where one strikes a horse whereby the rider is thrown (*Dodwell* v. *Burford* (1670) 1 Mod. 24) or breaks the ice just in front of a skater (Kenny's *Outlines of Criminal Law*, 16th ed., p. 166); it would be a battery " if a person was sitting on something, say a pile of boxes, which an accused person knocked away and brought him to the ground " (*McMasters* [1920] New Zealand Gaz.L.R. 351, *per* Chapman J.—*cf.* Winfield, *Textbook of the Law of Tort*, 6th ed., p. 253: " Pulling away a chair . . . from one who is about to sit on it is probably an assault until he reaches the floor, for while he is falling he reasonably expects that the withdrawal of the chair will result in harm to him. When he comes in contact with the floor, it is a battery ").

## III. The Growth and Collapse of the Doctrine of the Passive Indecent Assault

Although the crime of common assault cannot be committed " passively," " passively " meaning " without causing or threatening to cause an impact," a doctrine arose in magistrates' courts according to which it was possible to commit what has been described in 8 *Journal of Criminal Law* 168 as a " passive indecent assault," " passive " meaning that the impact is occasioned by the movement not of the accused but of the victim himself. This doctrine was not peculiar to English law: the French Penal Code does not define " indecent assault" but the decisions of the French courts have established the principle that to constitute an indecent assault " it is not necessary that the obscene act be practised on the person itself of the victim; the crime exists when a child has been employed to practise it on the person of the offender " (Reutenauer, " The French Penal Law Relating to Criminal Assaults on Minors," 6 Jrnl.Comp.Leg., 3rd S. (1924), pp. 50–66, at p. 51). Similarly, amongst English lawyers, until *Fairclough* v. *Whipp* (1951) 35 Cr.App.R. 138, " it is believed that . . . the view " was " widely held that, as a child cannot consent to any indecent act, the mere passive conduct of a prisoner in remaining still while a child did something indecent to him amounted to an indecent assault on the child" (*Jervis*, (1952) 116 J.P.J., p. 84).

This doctrine arose, partly at least, as a result of the Court of Criminal Appeal's decision in *Hare* [1934] 1 K.B. 354, which came to be regarded as an authority for the proposition that a woman who seduced a boy under the age of sixteen would be *ipso facto* guilty of an indecent assault and consequently that an indecent assault could be committed "passively." Thus in 1938 a girl of seventeen was charged at Colchester Magistrates' Court with having indecently assaulted a boy of fifteen by having seduced him and become pregnant by him; she was found guilty and put on probation for two years (*Police* v. *Marchant*, 2 *Journal of Criminal Law* 324). In 1944 Sidney Boxer was charged at North London Magistrates' Court with indecent assault on a boy of seven. The accused had exposed himself in the presence of the boy and the boy, at the invitation of the accused, had applied himself indecently (*per os*) to the accused's person. Such cases would now be dealt with under section 11 of the Criminal Law Amendment Act, 1885 (procuring the commission of an "act of gross indecency with another male person": *cf*. *Burrows* (1951) 35 Cr.App.R. 180); but a charge of gross indecency is applicable only if both the offender and the victim are males and in any case cannot be disposed of summarily, whereas a charge of indecent assault upon a person under the age of sixteen may, with the accused's consent, be dealt with summarily under the Magistrates' Courts Act, 1952, s. 19.

Boxer, then, was charged not with gross indecency but with indecent assault; when the learned magistrate, Mr. W. Blake Odgers K.C., questioned whether the facts disclosed the commission of an indecent assault, the prosecuting solicitor submitted that *Hare* was in point. It has been seen that in *Hare* the Court of Criminal Appeal decided merely that a woman may be convicted of an indecent assault upon a male person and did not consider the question whether an indecent assault may be committed "passively." The submission of the prosecution in *Boxer's* case, therefore, seems to be based on the following line of reasoning:—

(i) In *Hare* the accused was convicted of indecent assault by having induced a boy to have intercourse with her.

(ii) From the reports of the case it appears that the court did not consider, and therefore did not think it relevant to consider, whether the woman was a "patient" in the act of connection.

Therefore

(iii) *Hare* is an authority for the proposition that an indecent assault may be committed passively.

Boxer was not legally represented and was sentenced to twenty-eight days' imprisonment. His appeal to quarter sessions resulted in his sentence being increased to one of six months. The learned writer who recorded *Boxer's* case in 8 *Journal of Criminal Law* at pp. 168–170 commented at p. 169: "In view of *R.* v. *Hare* it seems unlikely that any Divisional Court would adopt a more restricted definition of 'assault' if on similar facts a case were ever stated." When, however, a case on similar facts was stated (*Fairclough* v. *Whipp* (1951) 35 Cr.App.R. 138), *Hare* was not cited and the Divisional Court rejected the doctrine of the passive indecent assault.

In *Fairclough* v. *Whipp* the respondent exposed himself in the presence of a girl aged nine and said "Touch it," which she did voluntarily, he not laying hold of her in any way. The Divisional Court reluctantly upheld the decision of the justices who had dismissed the case and Lord Goddard C.J., delivering the court's judgment, said at pp. 139–140:—

> "It is unnecessary to go into any old learning on what constitutes an assault. An assault can be committed without there being battery, for instance, by a threatening gesture or a threat to use violence made against a person, but I do not know of any authority that says that, where one person invites another person to touch him, that can amount to an assault. The question of consent or non-consent arises only if there is something which, without consent, would be an assault on the latter. If that which was done to the child would have been an assault if done against her will, it would also be an assault if it was done with her consent and is of an indecent nature, because she cannot consent to an indecent assault. But before we come to the question whether there was an indecent assault we must consider whether there was an assault, and I cannot hold that an invitation to somebody to touch the invitor can amount to an assault on the invitee."

With great respect it is to be regretted that the Divisional Court found it "unnecessary to go into any old learning on what constitutes an assault," for the decision in *Fairclough* v. *Whipp* seems to be based on the assumption that the impact, or threatened impact, necessary to constitute a battery, or an assault, must be occasioned by the movement of some matter against, or towards, the victim: it has been seen that a battery may be committed where the impact is occasioned by the movement of the victim himself against some stationary matter, provided that the accused has intentionally caused the impact. (If the necessary *mens rea* is present, " a man can be said to have caused the *actus reus* of a crime if that *actus* would not have occurred without his participation in what was done ": Kenny's *Outlines of Criminal Law,* 16th ed., p. 15). The term " indecent assault " includes indecent battery. The doubtful doctrine that " mere words . . . can never amount to an assault " (Archbold, 33rd ed., p. 991 ; *cf.* Kenny, 16th ed., p. 167) is wholly inapplicable for the purpose of determining whether there has been a battery, as distinct from a mere " assault " ; and one would have thought that in *Fairclough* v. *Whipp* there was an " indecent assault " not because the respondent invited the child to touch him but because as a result of his invitation she touched him and thereby occasioned an impact ; since that impact was an act of indecency, it was no defence that the child consented to it, so that, in law, the respondent ought to be regarded as the sole cause of the impact.

It has been submitted that the doctrine of the hostile act cannot apply to a charge of indecent assault on a person under sixteen, and it is convenient at this stage to observe that nowhere in *Fairclough* v. *Whipp* did the court say that a hostile act was necessary to constitute an indecent assault on a child. What Lord Goddard C.J. did say, however, after distinguishing *Lock* (1872) L.R. 2 C.C.R. 10 (a case which decided that mere submission by a child does not amount to consent, but which is hardly relevant now that it is provided by statute that consent by a child to an act of indecency is no defence to a charge of indecent assault), was:—

> " It seems to me there must be an act done to a person " (35 Cr.App.R. 140).

In view of *Fairclough* v. *Whipp,* a woman who induces a boy under sixteen to have connection with her cannot be convicted of indecent assault unless the prosecution can prove that she has " done something to " him, *e.g.,* that she was an " agent " in the act of intercourse or that she handled him indecently.

One of the purposes of this article is to submit that *even " non-indecent " handling of a consenting child in circumstances of indecency can amount to an indecent assault.* To this submission there are two obstacles ; the first is the doctrine of the hostile act (see above, p. 451) and the second is the wording of section 1 of the Criminal Law Amendment Act, 1922. Before these obstacles are surmounted it is necessary to consider the meaning of the term " indecent assault."

(*To be concluded*)

# Do We Need a Jury?[1]

By Travers Humphreys

It seems to me to be necessary for any person who is setting out to find the answer, or possibly answers, to the question: " Do we need a jury? " to have some acquaintance with the history of juries in England, since the system of trial by jury which has prevailed in this country for centuries is essentially and peculiarly English. In fact, until comparatively modern times trial by jury was the established method of deciding any disputed question of fact in a court of law. So much so that the law books tell us that there was a practice prevailing among the Chancery judges of referring any such issue to the King's Bench Courts for decision by a jury since juries were unknown to the procedure of the Courts of Chancery.

The history of the gradual encroachment upon the right of a litigant to a trial by jury is too long and complicated for the present article. It must suffice to say that since the year 1933 the matter has been left by statute to the unfettered discretion of one of the Masters of the Supreme Court subject to the right of appeal to the Judge in Chambers. I can myself remember the time when the lists of cases in the King's Bench Division and the cause lists on circuit consisted for the most part of cases for trial by jury with a comparatively small addition of cases for trial by judge alone. Gradually the fashion changed—Masters inclined strongly to mark cases " judge alone," and for some years before the Second War while in theory a litigant who desired a jury—and many of them did so—was in just the same position as the other party who preferred trial by judge alone, in practice trial by jury in civil cases was rapidly becoming obsolete. There can be no doubt that many cases which came up for decision by the Master were much more suitable for the decision of a lawyer than a body of laymen, the dispute being more in the nature of law than fact, while a jury could always be claimed as of right by a litigant charged by the other party with fraud. On the other hand, I find it difficult to understand why a widow whose husband has been killed in a motor accident, or a workman injured, as he alleges, by the negligence of his employer should be deprived of a trial by jury, if he or she prefers it in favour of a trial by a single judge, for that was, and is, the only alternative to trial by jury known in this country. I have discussed the matter with lawyers, both judges and practitioners, in other countries, France, Belgium and Holland in particular, and as I have stated in public, I have found something like unanimity among them in their surprise that we, the great upholders of trial by jury, as they say, should when we abandon that institution have nothing better to offer the litigant than a trial by a tribunal consisting of a single lawyer. What is there in the training of a judge, they ask, that makes him an acceptable substitute for the collective wisdom which we find in a dozen citizens chosen at random? I can only say that if there is an answer to that query I am not aware of it.

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[1] This is a hitherto unpublished article written in 1954 by the Rt. Hon. Sir Travers Humphreys and found among the late Judge's papers after his death.

It was, of course, the War of 1939 which virtually abolished trial by jury in civil cases, by the Act of that year,[2] the Act being an emergency provision to last only until by Order in Council the Sovereign declares it to be no longer necessary that the Act should continue in force. In 1946 the Bar Council passed a resolution " that the time has now come when the right of litigants to have their cases tried by judge and jury should be fully restored," and the position so far as I understand it is now similar to that which prevailed before the War. It is an undeniable fact that the Court of Appeal does not regard the finding of fact by a single judge in the same light as a similar finding by a jury.

In the latter case the Court of Appeal will not interfere except in a very exceptional case, or where the issue before them is one as to the amount of damages, while even on the question of damages the court will not set aside the verdict of the jury unless there has been in their opinion a departure from the right principle which should have guided the tribunal in the particular case. In the case of an appeal from a judge, the court regards itself as being at liberty to reverse the decision in any case in which it considers that the trial judge took a wrong view of the facts. Such was the view taken, as I understood, at the time when I was on the Bench. The view of some of our Continental friends is that the best tribunal for the trial of a civil cause is one consisting of three judges. Such a court is likely in my opinion to make an admirable tribunal both of law and fact. There is, I am afraid, no likelihood whatever of persuading Parliament to treble the number of judges, nor have we, apart altogether from the expense, the necessary accommodation for such an establishment either in London or the provinces. There are other difficulties which occur to one of so formidable a character that I feel on safe ground in saying that in my opinion the system in force on the Continent cannot be adopted in England.

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[2] Administration of Justice (Emergency Provisions) Act, 1939, s. 8. Similar provisions were made for Scotland (Administration of Justice (Emergency Provisions) (Scotland) Act, 1939) and Northern Ireland (Administration of Justice (Emergency Provisions) (Northern Ireland) Act, 1939). All these Acts have been repealed.

At the same time my active connection for sixty-five years with the administration of justice leaves me with the belief that trial by jury is one of the most valuable and characteristic of the laws and customs of England. I hope that the right of a litigant to claim a trial by jury will never be taken away, but on the contrary will be safeguarded. If the law is to be altered I hope that emphasis will be laid on the right of every litigant to claim a jury *unless good cause to the contrary be shown.*

In expressing that opinion I am far from suggesting that cases involving accounts, cases likely to turn upon a question of law, or, indeed, any case where there is no serious disagreement as to the facts could not be satisfactorily tried by a judge of the Queen's Bench Division, as, indeed, they have always been tried, and to the complete satisfaction of the parties, by the Chancery judges, (there being, of course, in such matters a right of appeal to a court of three Lords Justices). But I have too often heard the wish expressed by litigants, by counsel, by solicitors and by judges themselves in relation to some disputed question of fact, " there ought to have been a jury in that case," to contemplate without serious misgiving the abolition of that ancient institution. Not infrequently it happens that the importance of a disputed question of fact is not apparent until the case is well under way, when it is too late to alter the mode of trial.

I understand that a suggestion has been made that a jury of seven persons might be tried. The experiment might well be made, and the strain upon the members of the jury panel in that way lightened—I am referring, of course, to civil actions. On the whole, however, there is no need to abrogate the old saying " judges for law, juries for facts."

I now turn to the question of trial by jury in criminal cases. I cannot bring myself to believe that there are any persons other than the inmates of a lunatic asylum who would vote in favour of the abolition of trial by jury in serious criminal cases. To me the idea is quite unthinkable unless and until some alternative method is put forward for consideration, and any such alternative would have to be backed by the experience of a civilised English-speaking country.

Many years ago, while I was still at the Bar, I was invited to address some English-speaking audiences in various towns in Holland, including The Hague, Amsterdam, Utrecht and Arnhem, upon some aspects of a criminal prosecution in England. I was much struck during our talks by the views of a very distinguished jurist who was himself well acquainted with English methods. " For us," he said, " I am satisfied that our system is the best, but there does seem to be something in the make-up of the average Englishman which results in his becoming a first-rate judge of fact. You, yourself, describe it as ' common sense '; you may be right. Assuredly if I were an Englishman I should be in favour of trial by jury in any serious criminal case."

And so say I, following humbly in the footsteps of those great masters of the common law, the Earl of Halsbury and the late-lamented Sir Harry Poland, both of whom repeatedly extolled the value of our jury system in criminal cases, adding as they both did, publicly and privately, " *And the jury is always right*."

In my humble opinion there is plenty of room for improvement in the administration of the criminal law in England without tampering with the jury system. We *do* need juries.

# Mr. Sutterthwick's Court

By A. E. JONES, *Magistrates' Clerk*

## Persistent Cruelty

Sergeant Quing, the warrant officer, opened the door which led from the court-room to the waiting-hall and called " Nellie Fielding; Thomas Fielding." A man and a woman who had been sitting together—apparently chatting amicably—got up and came through the door. The court-room was empty except for Mr. Sutterthwick the magistrate, Frell the clerk, Miss Garrafrey the probation officer and Sergeant Quing. Mrs. Fielding was accusing her husband of persistent cruelty and asking for a separation order on that account, so the public were excluded from the proceedings. The press reporter could have been present if he had wished, but the Fieldings had no news value.

The warrant officer indicated to the husband a seat in front of the dock and escorted the wife into the witness box. She was a stout woman with a purply pink, heavily powdered face and she breathed noisily. In response to Sergeant Quing's request she took the Book in her right hand and repeated the words on the card aloud with considerable emphasis. The effect was somewhat spoiled by the fact that she swore, until corrected, to tell " the truth, the whole truth and anything but the truth."

### *Charge*

Frell began his stock series of questions designed to elicit the tale of woe in orderly sequence but soon experienced difficulty in keeping it within formal bounds. She had been married twenty-three years and there were four children of the marriage. But none was under sixteen so they were no concern of the court's unless they were a source of income to the parties, which the complainant made clear they weren't, because they'd all left home as they were so fed up with the way their father carried on. Did she say that her husband had been persistently cruel to her? She certainly did and she glanced triumphantly at the stringy, sharp-featured figure in front of the dock. How long had it been going on? All her married life; he'd always been a beast to her; why, when she was carrying her first he went for her once and pushed her over a chair and she got hurt and had to go to the doctor and nearly lost the baby.

But that was rather a long time ago and the most convenient chronology from the court's point of view was to start with the latest incident and then work backwards in time. When was he last cruel to her? Three weeks ago this Thursday, when she came for the summons. What did he do to her then? He went for her and punched her unmercifully till she was black and blue from top to toe. She didn't know why he did it. He was always like it. He came home the worse for drink in a vile temper and just picked a quarrel over any little thing. She couldn't remember what the quarrel was over that time. When was he cruel to her before that? About a fortnight previously; he tried to strangle her then.

A protesting " Oh " was uttered so forcibly by the defendant at this statement that the court's attention was distracted from the witness for the moment. But this was not the House of Commons and such interjections were not in order. Realising that he was the focus of disapproving looks from the magistrate, the clerk and the warrant officer, Mr. Fielding subsided into mute, but simmering, indignation. His wife proceeded calmly with her description of the attempted strangulation; he had his hands round her throat and was threatening to do her in because he said she'd been going with other men, but, of course, it wasn't true.

And when before that was he cruel to her? She couldn't remember the date but she supposed it must have been over three months ago. He pushed her downstairs that time.

" Oh, you liar. You know you were so drunk you fell downstairs," burst out Mr. Fielding, forgetting his previous lesson.

" Please don't interrupt," said Frell coldly. " You'll have a chance to question her later and to give your own account of the matter."

" It's more than flesh and blood can stand," said the defendant but relapsed again into resentful silence.

Mrs. Fielding resumed her account of the injuries she received in her fall. She cut her hand on the edge of a stair and twisted her back and was under the doctor for three weeks afterwards. Her husband had started " creating " on that occasion because of his dinner, and one thing had led to another. He was always grumbling about his food and saying that she didn't look after the house properly and that she was no good to him. But she had always been a good wife and always had a good meal ready for him when he came home from work. She was sure she'd always done her duty in the house and nobody could say she hadn't brought the children up properly, but they'd all left home now because they couldn't stand the constant rows in the house and their father's continual nagging and vile temper and coming home the worse for drink. It was too much for anyone to stand actually. After twenty-three years of it she couldn't put up with it any more. It was making her a nervous wreck. In fact, it was the mental cruelty she complained of more than the other really. But she wouldn't have said that if she had read the law on the subject.

" Have you been to see a doctor about your nerves? " inquired Mr. Sutterthwick.

" No sir, I've just carried on and put up with it," she said bravely, but the magistrate could not help noticing that her complexion did not suggest a deterioration in health due to neurosis. Still, there was a general picture of a course of cruel conduct, backed by three specific incidents in the last six months. It was a case to answer. Had she any witnesses? " No, he's too clever for that," was the reply.

Frell took over the questioning again from the magistrate and completed the wife's evidence by eliciting her financial position. She earned £2 10s. a week part time; she didn't know what her husband earned; he never told her; but he gave her £5 a week. She paid the rent of 13s. 6d. a week but she admitted she had nothing to complain of on the monetary side of matrimony.

*Counter-charge*

Now at last the defendant had a chance to open his mouth legally. His pent-up feelings almost visibly burst a dam within him as Frell said " Do you want to ask your wife any questions? " The result was cross-examination without the hyphen. Mr. Fielding reproved his wife at great length and when she managed to get in a rejoinder, proceeded to argue with and contradict her. Mrs. Fielding, on her side, had quite a few questions to ask her husband and deemed this the opportunity to put them. It was in vain that the clerk explained to the parties first patiently, then sternly and finally exasperatedly, that all this was not in accordance with the established rules of procedure in English courts of law. The combatants in the wordy duel of slander and counter-slander only checked their strokes momentarily for him. Mrs. Fielding had dropped the quiet, polite manner in which she had given her evidence in chief; the sight of her husband's pointed features and finger, and the sound of his rasping denunciations had obviously put her surroundings out of her mental view. The pair were back on the family hearthrug engaged in a domestic row which ranged to and fro over all the years of their married life and dredged up most of its unpleasant episodes.

Mr. Sutterthwick leaned back in his chair with half-closed eyes and watched and listened. He made no attempt to reinforce the clerk's efforts to bring the proceedings within the prescribed pattern. Indeed, at one stage he murmured " Let them run a bit, Mr. Frell. I find it very helpful." Still there came a time when this sort of thing had exhausted its usefulness even for the man who had to decide where the truth lay between the parties. And Mr. Fielding was obviously getting a little dissatisfied with the results of his cross-examination; it was no use his saying " Now, Nell, tell the truth for once in a way "; he merely got back " Don't you 'now Nell' me," and an accusation which sometimes took him so by surprise that he had no reply ready. " Well, you don't seem to be making much headway with your questions, Mr. Fielding," said the magistrate at last. " Would you like to finish your cross-examination and come and give evidence on oath yourself? "

The defendant leapt at what seemed an opportunity to escape interruption. " Yes, sir, I would," he said. " It's no use asking my wife questions. She's the biggest liar in the world."

In the witness box Mr. Fielding gave it as his opinion that the whole cause of the trouble was his wife boozing too much and getting mixed up with a bad set in the " Red Lion." They'd put her up to this, he wouldn't be surprised; he felt sure there was somebody egging her on to have a separation because there was no real reason for it.

"Yes, I like a drop now and then," he admitted, when the magistrate could get in a question. "But I go to the "Pied Bull." It's a nicer sort of house. And I know when to stop."

"No, you don't. What about when I had to put you to bed on the sofa because you were too drunk to get upstairs," interjected his wife.

"Well, that was Christmas time," protested the witness in an injured tone. It was Mrs. Fielding's turn now to be told by the clerk not to interrupt.

In response to further questions from Mr. Sutterthwick the defendant agreed that he and his wife had had their "ups and downs the same as any other couple." But he had not been persistently cruel to her. You could say she'd been cruel to him if you liked. That was more it. He had the marks now where she hit him on the head with a poker. He had had to go to hospital and was three weeks away from work over that. It was some years ago. But she often set about him with things. The time when she said he pushed her down the stairs, which he never did, because she fell down them through being under the influence, she'd come home late and had left his dinner in the gas oven while she went to the pub and it got dried up to nothing, and when he told her about it she up and took the plate and threw the whole lot at him and told him he could take it that way if he didn't like it the other, but he dodged it, of course, because her aim wasn't very steady through the drink and then when he went towards her just to ask what she meant by it she ran out of the door and went to go down the stairs and tumbled down the whole lot, and he never touched her but picked her up and bathed her head and sent for the ambulance and went with her to hospital, and she admitted it was all her fault and thanked him for looking after her and they agreed to make it up and start afresh and she promised not to go to the "Red Lion" so often, but she didn't keep her promise and things got as bad as ever again. And that was really the whole cause of the time when she said he tried to strangle her which was a wicked lie as he was only trying to frighten her because he'd found her coming home at half past eleven at night with a man she'd been drinking with in the "Red Lion" and he wasn't going to stand for that sort of thing. Three weeks ago Thursday he did give her a tap or two but it was only in self-defence after she'd attacked him first and tried to break a vase over his head. There'd been an argument over her spending too much money on drink and having got into debt which he didn't know about until the tallyman came on him, and he naturally objected to that because he'd always been a good husband and brought his wife her wages home regular every Friday night. That was the only time he had hit his wife this year and if he had ever hit her before that it was after she'd gone for him first, the same as it was this last time.

"But do you think it right ever to hit a woman?" asked Mr. Sutterthwick, who could never get used to the standards of conduct accepted in some parts of his jurisdiction.

"Well, no, not really sir," replied Mr. Fielding in the manner of one admitting an academic point of no practical significance. "But what else could I do? She'd have killed me if I hadn't stuck up for myself."

"You could have gone out."

"She'd only have accused me of going with other women and then there'd have been worse trouble."

The magistrate tried another line. "Do you really want to continue living with your wife?" he inquired.

"Not if she wants a separation, but I don't think it's necessary. We could get on all right if she'd only give up the drink."

Mrs. Fielding, since the clerk's rebuke, had been punctuating her husband's evidence with expressive intakes of the breath and dramatic gestures of shocked surprise and disgust but had refrained from actual words. Now the gag was removed. "You can ask him questions now," said the magistrate, "But wait for an answer from him and don't just make statements." Mrs. Fielding, however, would have considered it a confession of weakness to treat her husband in this way. Her cross-examination led to a resumption of the domestic battle which had been broken off when Mr. Fielding went into the witness box. Mr. Sutterthwick had soon heard enough and by insisting on the correct legal pattern of question and answer he reduced the combatants to a baffled silence.

The defendant, like the complainant, had no witnesses.

### *Discharge*

"In this case," said Mr. Sutterthwick, "I'm satisfied that Mr. and Mrs. Fielding are leading an unhappy life together. I think they both behave deplorably and it seems to me that both would be better if they took less to drink. They obviously have disgraceful fights, but I believe that, generally speaking, it's six of one and half a dozen of the other, and I'm not prepared to hold that the husband has been persistently cruel to the wife. So the summons will be dismissed. But though I can't make a court order, that doesn't prevent the parties from making an agreement themselves if they feel there's no likelihood of their leading a decent life together. Mr. Fielding would, of course, have to make his wife an allowance if they parted in this way. The probation officer will help them with advice on this matter if they require it. And also, if there's still a chance of patching up this marriage and Mr. and Mrs. Fielding would like to try again, the probation officer would be only too ready and willing to help in that matter too."

"I've been reconciled twice already by the probation officer," broke in Mrs. Fielding. "I'm fed up with being reconciled, I want a separation."

Miss Garrafrey smiled philosophically. It was in the nature of things that her successes could not be advertised in the same way as her failures.

# *The Administration of Criminal Justice in Northern Ireland*

By J. Ll. J. Edwards

*Reader in Law in the Queen's University of Belfast*

(*Continued from p.* 315)

## Rights of Appeal

### *Appeals in cases which are originally dealt with summarily*

Where the accused desires to make a straightforward appeal against conviction or against the sentence imposed by the resident magistrate, or on both these grounds, the rights of appeal to a Northern Ireland court of quarter sessions are exactly the same as those incorporated in the Magistrates' Courts Act, 1952, s. 83. Such an appeal is by way of a complete rehearing and is decided by the chairman sitting alone, the system being thus comparable to the powers exercised by the recorder of a borough quarter sessions in England, but distinguishable from the appeal committees instituted for county sessions under the Summary Jurisdiction (Appeals) Act, 1933, s. 7.[1] Furthermore, as both the latter enactment and the Summary Jurisdiction and Criminal Justice Act (N.I.), 1935, s. 24, curiously show, where the finding of guilty is confirmed on appeal, although quarter sessions can either lower or increase the punishment awarded at the original trial, its maximum sentence must not exceed that which could have been imposed by the magistrates' court. In the event of an acquittal by the resident magistrate, no appeal at the behest of the prosecution lies to quarter sessions, a principle which was overlooked in *Northern Ireland Road Transport* v. *Benson* [1940] N.I. 133, but it is seen forming the basis of the House of Lords' decision in the same case, [1942] A.C. 520.

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[1] For some well-directed criticisms of the existing procedure under which English courts of quarter sessions determine appeals from petty sessions, see [1954] Crim.L.R. 199–201.

Alternatively, the defendant or, in this instance, the prosecutor may appeal by case stated on the ground that the resident magistrate's decision was wrong in law. Until recently, such appeals were heard, as they are in England,[2] by the Queen's Bench Divisional Court, but under the Northern Ireland Act, 1955, s. 2 (1), the responsibility for determining such appeals in the Province is now transferred to the Court of Appeal. With the existence of a Court of Criminal Appeal, it might be thought that the latter court provided the more appropriate appellate tribunal, but since the Court of Criminal Appeal is convened only rarely, it was presumably thought to be administratively more convenient for all appeals by case stated, both civil and criminal, to be heard by the Court of Appeal which is generally in session. Assuming the prisoner, instead of appealing direct to the Court of Appeal, chooses to appeal to quarter sessions by way of a rehearing, and is then dissatisfied with the chairman's decision as being wrong in point of law, he may ask the court to state a case for the opinion of the Court of Appeal, and the same right of appeal is open to the prosecution. Except that an English defendant or prosecutor would again have such an appeal heard by the Queen's Bench Divisional Court, and not the Court of Appeal, no difference exists between the two systems of law and in both jurisdictions the decision of the English Divisional Court and the Northern Ireland Court of Appeal, respectively, is conclusive.

### *Appeals in cases of binding over orders*

Quite distinct from such appeals against convictions is the lead shown by Northern Ireland law in relation to appeals against a magistrate's order to enter into a recognisance, with or without securities, to keep the peace or to be of good behaviour. Jurisdiction in respect of such binding-over orders stems from several sources.[3] Thus, under the commission of peace, justices have a general power to bind over any person to keep the peace where it appears that such person's conduct tends towards a breach of the peace, and, by the Justices of the Peace Act, 1361, justices are empowered to bind over a person to be of good behaviour generally. Finally, there is, in English law the additional provision in the Magistrates' Courts Act, 1952, s. 91 (re-enacting the provisions of the Summary Jurisdiction Act, 1879, s. 25) which regulates the power of a court of summary jurisdiction to bind over a person to be of good behaviour towards a particular complainant.

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[2] In a notable survey entitled "The Court of Criminal Appeal—The First Forty Years," (1951) 1 *Journal of the Society of Public Teachers of Law* 425, 440, Professor Seaborne Davies criticises the English bifurcated system of appeals in criminal matters as no longer corresponding to reality when its very basis, the distinction between offences tried summarily and those tried on indictment, has become so artificial. The learned writer suggests the possible fusion of the appellate jurisdiction of the Divisional Court with that of the Court of Criminal Appeal, and the reconstitution of the new court in divisions in a manner which would ensure a more constant composition and yet reduce the present heavy burden of work on those judges who discharge the appellant criminal work.

The English law relating to appeals against such binding-over orders has been described by Dr. Glanville Williams as being " in a discreditable state " (16 *Modern Law Review*, at p. 427, and see, too, 64 *Law Quarterly Review* 312), owing to the fact that, although such an order involves a stain on a person's character, technically the order does not constitute a conviction, and, consequently, no appeal lies from petty sessions to quarter sessions under the provisions of the Magistrates' Courts Act, 1952, s. 83. The decision of the Divisional Court to this effect in *R.* v. *County of London Quarter Sessions Appeals Committee* [1948] 1 K.B. 670,[4] it is true, was concerned only with the right of appeal against a magistrate's order binding over a defendant to be of good behaviour under the statute of 1361, but there can be little doubt, despite a dissenting judgment in that case by Atkinson J., that an order made under one or other of the concurrent powers of binding-over would not be cognisable on appeal by a court of quarter sessions. The same writer has suggested (*loc. cit.*) that there are some fragmentary substitutes for an appeal to quarter sessions, amongst which he lists an appeal by case stated and by applying for an order of certiorari. So far as Northern Ireland is concerned the defects in the existing law were rectified by the Criminal Justice Act (N.I.),

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[3] For a review of the law relating to such orders, see *R.* v. *London Quarter Sessions Appeals Committee* [1948] 1 K.B. 670, *per* Lord Goddard C.J., and *Everett* v. *Ribbands* [1952] 2 Q.B. 198, *per* Denning L.J. It must be emphasised that we are not here concerned with those instances in which a person is convicted of an offence and the court is empowered, in addition to, or in lieu of, any punishment authorised by the relevant statute, to order the defendant to be bound over for a certain period. Examples of such statutory provisions include the Larceny Act, 1861, s. 117, the Malicious Damage Act, 1861, s. 73, the Offences against the Person Act, 1861, ss. 43 and 71, and, restricted to Ireland, the Whiteboys Act (Ireland), 1756, s. 2.

[4] See, too, *R.* v. *London Sessions, ex p. Beaumont* [1951] 1 K.B. 557.

1945, s. 12, which conferred upon a person who is " bound over " the same rights of appeal to quarter sessions as in the case of a person convicted, but with the express proviso that the order appealed against shall continue in force pending the determination of the appeal. In England, on the other hand, it has been left to the assiduousness of a private member to set the wheels of legislative reform in motion with the Magistrates' Courts (Appeals from Binding Over Orders) Bill,[5] which has as its simple object the creation of a right of appeal to quarter sessions in every case, whether under the Justices of the Peace Act, 1361, or otherwise, in which a person is bound over to keep the peace or to be of good behaviour.

### *Appeals in cases which are originally dealt with by indictment*

Reference has already been made to the close analogy which exists between the constitution and powers of the English and Northern Ireland Courts of Criminal Appeal ([1956] Crim.L.R. 315). The grounds of appeal against conviction or sentence on trial by indictment at assizes or quarter sessions are identical in both systems and so, too, are the statutory provisions regulating the court's determination of appeals. From the Court of Criminal Appeal in Northern Ireland a further right of appeal lies to the House of Lords but only where the fiat of the Attorney-General for Northern Ireland is granted. Such fiat is issuable on the same grounds as under English law, but, strange though it may seem, since the enactment of the Criminal Appeal (N.I.) Act, in 1930, there has not been a single instance of an appeal being heard by the House of Lords concerning a criminal case originally tried in a Northern Ireland court of quarter sessions or assizes.

## The Machinery of Prosecutions

### *Prosecutions at the assizes and quarter sessions*

The office of Director of Public Prosecutions, as such, is unknown in Northern Ireland, the corresponding functions in the Province being administered by the Attorney-General, who is the only law officer of the Crown. Alongside the Attorney-General, and subject to his directions, is a permanent official described as the Chief Crown Solicitor, who also fulfils the duties associated with the Treasury Solicitor in England and the Crown Agent in Scotland (see [1956] Crim.L.R. 107). These two officers are the principal representatives of the Crown in all matters relating to criminal prosecutions, including nearly all the Government Departmental prosecutions for statutory offences. They, in turn, are represented in each of the six counties by a Crown Solicitor, who is appointed on a part-time basis only, and two Crown Counsel who are not appointed in the strict sense of the term but receive briefs on the direction of the Attorney-General. Crown Counsel in Northern Ireland are further distinguishable from the Scottish Advocates Depute in that they are free to appear outside their particular county as counsel for the defence (*cf.* [1956] Crim.L.R. 105). In addition, there is an assistant Chief Crown Solicitor, who combines with this position the duties of Crown Solicitor for the county borough of Belfast.

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[5] The original title of the Bill was the Justices of the Peace Act, 1361 (Amendment) Bill, but this was changed in Committee to the present more accurate and more descriptive title.

Prosecutions in courts of quarter sessions are normally conducted by the Crown Solicitor for the county, though in Belfast, by tradition it would appear, prosecutions in the recorder's court are in the hands of counsel for the Crown. And at the assizes counsel always appear on behalf of the Crown, there being no hard-and-fast rule on the selection of senior counsel for this role. An interesting practice in Northern Ireland—it is equally applicable in the courts of the Republic of Eire—is the right of counsel for the Crown, as the Attorney-General's deputy, to exercise the privilege of making the final speech to the jury. This privilege, it is only fair to add, is nowadays seldom exercised, Northern Ireland thus tending to fall into line with the decision of the English law officers in 1930 no longer to claim the right to the last word—a right which, in England and Wales, could only be claimed if the Attorney-General or Solicitor-General was appearing in person.

### *Prosecutions before courts of summary jurisdiction*

In the courts of summary jurisdiction, the pattern of prosecutors is somewhat more varied than in cases of trial by indictment, though it is equally true to say that the number of summary prosecutions conducted by private persons is extremely rare. Police prosecutions are the normal event and, if the case involves a straightforward charge of a minor summary offence, the complainant, usually a constable of the Royal Ulster Constabulary, conducts the prosecution himself. Should any difficulties be envisaged or if the charge involves one of the indictable offences triable summarily, the general practice is for a head constable or district inspector to be named as the complainant, thus giving such officer, although not himself the actual informant, authority to conduct the prosecution. In this respect, it is interesting to compare the English police practice as outlined in [1956] Crim.L.R. 169. To overcome some of the difficulties which might be raised as to the lawful authority of such prosecuting officer, provision was made in the Criminal Justice Act (N.I.), 1945, s. 20, that in summary proceedings—which term presumably includes both summary offences and indictable crimes triable summarily—where the complainant is an officer of the Royal Ulster Constabulary the court may, in his absence, give permission for a head constable or other officer to conduct the proceedings on his behalf. Statutory sanction has thus been given to the customary practice in police prosecutions in Northern Ireland.

Notwithstanding the absence of any statutory right of audience in the informant where the proceedings are before examining magistrates, it would appear that considerable latitude is extended by local Benches in England and Wales to the police when acting as the prosecutor at such hearings ([1956] Crim.L.R. 172–173). A similar indulgence is exercised by Northern Ireland resident magistrates, though, perhaps, legal representation in the form of the Crown Solicitor or junior counsel is more common than in England, especially if the case presents any difficult aspects. Furthermore, with the Royal Ulster Constabulary essentially a State police force, subject in matters relating to criminal prosecutions to the direction of the Attorney-General, there is a uniformity of practice which is sadly lacking in this country. There is, of course, much to commend in the Scottish system of the procurator-fiscal and his assistants conducting all public prosecutions, but the peculiarly Northern Ireland compromise of distributing responsibility for prosecutions between the police and part-time Crown solicitors and counsel appears to provide a satisfactory system in the six counties.

## Juries and Grand Juries

### *The case against the continued retention of grand juries at Northern Ireland assizes*

Yet another compromise in the administration of criminal justice in Northern Ireland is to be seen in the retention of grand juries at assizes and at the Belfast city commission, whilst dispensing with their services at recorders' courts and quarter sessions. This latter step was taken in the Jury Laws (Amendment) Act (N.I.), 1926, s. 5, thus preceding by several years the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 1, which rightly eschewed adopting a similar middle course and abolished grand juries altogether in this country. Their disappearance from the scene in England and Wales does not appear to have created any posthumous difficulties, and it is difficult to see the justification for retaining in Northern Ireland, albeit in a limited sphere, the last vestiges of the feudal notion that the maintenance of law and order is the peculiar prerogative of leading members of society.

The case for differentiating between grand juries at the assizes and quarter sessions, respectively, was made in the Report of the Andrews Committee on the Jury System in Northern Ireland (Cmd. 25 of 1924, pp. 9–10). It was this committee which recommended the retention of grand juries at assizes, on the ground that it was important to have the more serious forms of crime triable in these courts fully investigated by a grand jury before trial in the public court. With the precise distinction between the jurisdiction of the assizes and quarter sessions in Northern Ireland not clearly defined, it is questionable whether this argument is sustainable, and the plea for a " full " investigation by a grand jury simply does not stand up to examination. No detailed study of the depositions, examination generally of police witnesses only, coupled with the short time required to perform this task, all combine to show the unsatisfactory nature of such private inquiry by members of the grand jury. A further argument advanced by the Andrews Committee, as necessitating the retention of grand juries at the assizes, was based on the fact that the presiding judge, in his charge to them, is afforded an opportunity of informing members of the grand jury as to the state of the county, the vigilance of the police and the detection of crime in the county. Presumably, however, the important thing is the wider publicity given to the judge's words in informing the general public of the relevant facts. With reporters in court, this task could be performed just as well in the absence of the grand jury, by addressing, if needs be, the ordinary jury panel.

As to the grand jury's primary responsibility of deciding whether a prima facie case exists against the accused, this, in effect, is a duplication of the task normally already performed in open court by a resident magistrate. To which there is the additional safeguard that in Northern Ireland all depositions in cases of indictable offences are sent to the Attorney-General who frequently directs that proceedings shall be discontinued. Furthermore, it is to be observed that when grand juries were abolished at quarter sessions, power was conferred by the Jury Laws Act (N.I.), 1926, s. 5, on the recorder or chairman to reject any bill of indictment on the ground of insufficiency of evidence against the accused. And, under the County Officers and Courts Act (N.I.), 1933, s. 13, this power was extended to include cases in which the person charged has not been committed for trial but where the bill of indictment is supported by proofs of the witnesses to be called in support of the charge. This latter power is paralleled in this country by the provisions of the Indictments Procedure Rules, 1933, made under the authority of the Administration of Justice Act, 1933, but with this important difference, that in England and Wales the discretionary power to reject a bill of indictment is exercisable by the presiding judge or commissioner at both quarter sessions and the assizes. Were a similar extension to be introduced into Northern Ireland law, it might well herald the demise of the existing remnants of the grand jury system.

### *Challenging and separation of juries*

A feature of Northern Ireland criminal trials is the considerable attention which is given to the empanelling of jurors, challenging being indulged in at great length. Under the Criminal Law (Ireland) Act, 1828, s. 9, a person arraigned for treason, murder or other felony was allowed a maximum of twenty challenges without having to show cause. And, unlike England and Wales, where no right of peremptory challenge was allowed in cases of misdemeanour prior to 1948, a person accused of a similar crime in Northern Ireland has always had the right to challenge six members of the jury without having to substantiate his challenge. Symmetry in this matter of challenging jurors was at last achieved in the Juries Act (N.I.), 1953, s. 9, with the same maximum of twelve peremptory challenges being allowed in any case of felony or misdemeanour, the corresponding figure for all indictable crimes in this country being laid down as seven by the Criminal Justice Act, 1948, s. 35.

By the same enactment, the presiding judge at English assizes and quarter sessions has authority in all cases to permit the jury to separate before retiring to consider their verdict, whereas, in Northern Ireland, cases of murder, treason and treason felony are excluded from a similar authority conferred by the Criminal Justice Act (N.I.), 1953, s. 39. Once the jurors have embarked on their deliberations, however, the position is the same in both jurisdictions, special permission of the court being required if the jury are either to separate or leave the place appointed for the consideration of their verdicts, and such permission is normally granted only in exceptional circumstances. Rare instances of verdicts being quashed for violation of this well-established law are to be found in two recent cases, *R.* v. *Neal* [1949] 2 K.B. 590, and *R.* v. *Taylor* [1951] N.I. 57.

### *Retrials following disagreement among the jury*

An apparent increase in the number of cases of juries failing to agree with the consequence that the accused is put back for a second, and sometimes a third, trial, has led Lord Goddard C.J. (*The Times*, November 10, 1954) to urge that consideration be given to reforming the jury system by introducing either majority verdicts or a reduction in the size of the jury. The belief that there is a tradition in this country not to put a man on trial for a third time is reinforced by the Lord Chief Justice's statement (*ibid.*) that it is hardly ever justifiable for the prosecution to be abandoned unless there has been at least two disagreements, although the cost of successive trials might be very heavy and the inconvenience to witnesses perhaps incalculable. For a man to stand trial on four successive occasions on a charge of murder might seem beyond the imagination of even a crime novelist, but such a situation occurred in Northern Ireland in recent years in the case of *R.* v. *Leighton*, and the exact circumstances of this unique case deserve to be placed on record.

At the first trial in 1952, at the Londonderry Summer Assizes, the jury disagreed after a three-day hearing. The second trial, which took place the following December at the Armagh Winter Assizes, was abandoned on the second day, after the accused's mother, a defence witness, had been injured in a car accident while on her way to court. The Lord Chief Justice of Northern Ireland remanded the accused for trial at the next Londonderry Spring Assizes in 1953, and when the case came up for hearing the jury found the prisoner unfit to plead. Accordingly, the prisoner was ordered to be detained during H.M.'s pleasure. Two years later, however, on the Attorney-General's directions, the case of *R.* v. *Leighton* was reopened at the Londonderry Spring Assizes before Curran J. The proceedings lasted only a few minutes and Leighton was not arraigned, the learned judge saying that, having regard to the history and nature of the case and the medical reports provided by the Crown, he had come to the conclusion that it would not be in the interests of justice that the trial should proceed before him, and he adjourned the case to the Summer Assizes. On this occasion, before the assize judge, Sheil J., after medical evidence had been given of the accused's fitness to plead and of the absence of any evidence of mental abnormality, the prisoner pleaded guilty and sentence of death was duly pronounced. The final chapter in this remarkable sequel of events was the speedy commuting of the death sentence to life imprisonment by the Governor of Northern Ireland acting on the advice of the Cabinet, a distinguishing feature of Northern Ireland criminal practice which will be dealt with in a subsequent article.

# *Practice and Procedure*

## Assizes

*Attendance of witnesses*

As to the attendance of witnesses conditionally bound over see below.

## Magistrates' Courts

*Conditionally binding over witnesses to attend trial*

Under section 5 (2) of the Magistrates' Courts Act, 1952, the examining justices may bind over a witness to attend the trial conditionally, *i.e.,* on notice being given to him, where it appears that his attendance at the trial is unnecessary " by reason of any statement of the accused, or of the accused having admitted before the court the truth of the charge, or of the evidence of the witness being merely formal." Section 13 (3) of the Criminal Justice Act, 1925, permits the use of depositions taken before examining justices at the trial, but as was pointed out in *R.* v. *Collins* (1938) 26 Cr.App.R. 177, this section was not intended to be used so as in effect to abolish the ordinary method of trial by jury. It " was passed simply with the object of saving time and expense in cases where no possible injustice could be done to anybody."

In 1952 the Court of Criminal Appeal called the attention of clerks to the justices to the desirability of exercising more frequently the powers of binding over witnesses conditionally. At that time judges on circuit found that the power was rarely exercised, and that consequently many witnesses were put to needless trouble in attending assizes and quarter sessions and unnecessary expense incurred. It was added that the court should tell the accused of his right to require the attendance of a witness conditionally bound over and of the steps for securing his attendance: *Practice Note* (1952) 36 Cr.App.R. 38.

Recently at Lancaster Assizes, however, Cassels J. refused to try a case, *R.* v. *Gilbert,*[1] in the absence of substantial witnesses for the prosecution. The prisoner pleaded not guilty to demanding money with menaces. None of the prosecution witnesses were present and all had been bound over conditionally. Counsel for the prosecution tendered the depositions, and counsel for the defence indicated that the prisoner did not dispute the evidence for the prosecution, nor that he had had full opportunity to cross-examine the witnesses in the magistrates' court; he proposed to call neither the prisoner nor any other witnesses, but to submit that the evidence disclosed no offence. He did not object to the absence of the witnesses. Cassels J. ordered that the case be adjourned so that the witnesses could attend. He called the attention of clerks to the justices to the fact that it is undesirable conditionally to bind over witnesses under the Magistrates' Courts Act, 1952, s. 5 (2), where they are important witnesses of the alleged offence and their evidence is not merely formal. [Peter G. Smith, Barrister-at-Law.]

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[1] For the prosecution: *G. W. Guthrie Jones* (instructed by A. H. Bryant, Blackpool). For the defendant: *Cecil Q. Henriques* (instructed by Robinson, Son & Co., Blackpool).

## Summary Justice

### *Agriculture*

Poultry. Moving poultry contrary to Ministry of Agriculture and Fisheries restriction orders; fined total of £6, ordered to pay £10 4s. 6d.; Saunders: Rye Magistrates' Court (*Sussex Express and County Herald,* April 6).

### *Animals*

Birds. Killing a coot during the close season and having fifty-two coot in his possession or control after a shoot; fined £13, ordered to pay £6 6s. costs; Beckett: Aldershot Magistrates' Court (*The Times,* May 8).

Birds. Selling ten live wild birds and having forty-four wild birds for sale; fined total of £10 10s. and ordered to pay £20 3s. costs; Jordan: Pontefract Magistrates' Court (*Yorkshire Post,* May 15).

Birds. Three boys, two aged 15 and one aged 13, damaging swan's nest while it was in use and taking three eggs; two older boys fined £4 each, younger boy £2: Romford Juvenile Court (*The Times,* May 31).

### *Aviation*

Carrying passengers illegally. Manager of holiday bureau aiding and abetting airline which had been refused permission to operate service to fly passengers from Blackbushe to Jersey; fined a total of £1,050 and ordered to pay 50 guineas costs; Hudson:

Mansion House Justice-Room, City of London (*Manchester Guardian*, May 1).

*Children*

Neglect. Sentences of imprisonment on man and wife for neglecting their children varied on appeal; both placed on probation for three years with direction that probation officers should visit house every week: Dexter, Dexter: Leeds City Quarter Sessions (*The Times*, May 10).

*Entertainment*

Cinema. Failing to ensure that there were sufficient adult attendants on duty to control audience of children, contrary to the Children and Young Persons Act, 1933, and to ensure that there were stationed on lowest floor of auditorium not less than one attendant to every hundred persons present contrary to the Cinematograph Regulations, 1955; fined £25: Liverpool Stipendiary Magistrate's Court (*Liverpool Echo*, May 24).

*Factories*

Fire warning. Company pleading guilty to failing to provide effective warning in case of fire contrary to section 36 (7) of the Factories Act, 1937; fined £15, ordered to pay 15s. costs; Robert C. Franklin, Ltd.: Keighley Magistrates' Court (*Yorkshire Evening Post*, April 26).

*Firearms, explosives and offensive weapons*

Firearms. Boy, aged 14, selling shotgun to boy, aged 11, in exchange for an air rifle which he previously sold to him for £5 and a clasp knife; put on probation for three years on condition that he did not use or own a gun of any description during that period; permission given for boy's name to be published; Evans: Dereham Juvenile Court (*The Times*, May 19).

*Food and drugs*

Milk. Supplying sixty gallons of milk which was not of the substance required by the purchasers and which was to their prejudice; suppliers delivering ordinary milk to hospital to which they were under contract to supply pasteurised milk; fined £5, facts that the suppliers' yardman was away at the time of the offence and that there were no harmful effects to the hospital patients being taken into consideration; Strong's Dairies, Ltd.: Bromborough Magistrates' Court (*Liverpool Echo*, May 14).

### *Official secrets*

Endeavouring to persuade another to commit an offence against the Official Secrets Act, 1911; fined £50; Harrington: Woolwich Magistrates' Court (*The Times,* May 23).

### *Railways and ships*

Railways. Trying to board a moving train; fined £1; Ashton: Harrow Magistrates' Court (*Evening Standard,* May 15).

Ships. Committing act tending to the immediate loss, destruction or serious damage of a tanker. Drunken seaman throwing lighted matches on deck of tanker; sentenced to six months' imprisonment; Jenkins: Llanelly Magistrates' Court (*The Daily Telegraph,* May 3).

### *Road traffic*

Licence. Failing to sign driving licence in ink; fined 5s.; Mullock: Wigan Magistrates' Court (*Liverpool Echo,* May 3).

Licence. Fifteen year old boy driving motor-cycle which he had saved up to buy for his sixteenth birthday; fined £5, disqualified from driving for two years: Willesden Juvenile Court (*Evening Standard,* May 9).

Licence. Fifteen year old boy riding motor-cycle two weeks before his sixteenth birthday while uninsured and while too young to hold licence; fined £3, disqualified from driving for a year: Huddersfield Juvenile Court (*Yorkshire Evening Post,* March 26).

Driving while disqualified and using uninsured machine. Man sitting astride motor-cycle free-wheeled it without the engine running; sentenced to three months' imprisonment, disqualified from driving for further two years; Russell: Northfleet Magistrates' Court (*Evening Standard,* May 17).

Obstruction. Leaving old taxi outside house for two months; fined £3 for failing to remove it or to take all reasonable steps to procure its removal as soon as practicable; Bogg: Bow Street Magistrates' Court (*The Daily Telegraph*, May 12).

Using a car without a horn; fined 10s.; Warrender: West Riding Magistrates' Court (*Wakefield Express,* April 14).

Using a lorry on which the tipping mechanism was in a condition likely to cause danger; fined £1; Haycock: West Riding Magistrates' Court (*Wakefield Express,* April 14).

Accident. Lorry driver, said to have driven three-quarters of a mile with a car entangled in the back of his vehicle, failing to supply particulars after an accident and failing to report the accident to the police within twenty-four hours; fined £10, ordered to pay 30s. costs; Kennedy: Leeds Magistrates' Court (*Yorkshire Evening News,* May 8).

### *Telephone*

Making offensive telephone calls on two occasions; fined £10, ordered to pay 7s. costs; Helsby: Liverpool Stipendiary Magistrate's Court (*Liverpool Echo,* May 18).

Making offensive telephone calls on three occasions; asked for twelve similar offences to be taken into consideration; fined £30, ordered to pay £1 5s. costs; Wills: Birmingham Magistrates' Court (*Birmingham Mail,* May 29).

Fraudulently using electricity belonging to Postmaster-General. Woman sending telegram by phone giving a false number; fined £5, ordered to pay £5 5s. costs; Randall: West London Magistrates' Court (*The Daily Telegraph,* May 9).

### *Trespass*

Man stopping caravan on an open site while baby was born; fined £1 for trespass; Gaskin: Nottingham Magistrates' Court (*Manchester Guardian,* May 19).

### *Vagrancy*

Fraudulent medium. Purporting to act as a spiritualistic medium and using fraudulent device contrary to Fraudulent Mediums Act, 1951; man holding up illuminated trumpet pretending that it had been raised from the ground by the power of a spirit; fined a total of £50, ordered to pay £10 10s. costs: Ealing Magistrates' Court (*Evening Standard,* May 29).

## Case and Comment

The reports of cases to which initials are appended hereunder have been specially prepared for *The Criminal Law Review* by the following reporters:—

HENRY PALMER, *Barrister-at-Law.*
J. D. PENNINGTON, *Barrister-at-Law*

**Accessory**—*Aiding in disposal of stolen goods.* See R. *v.* BROOKER, p. 489, below.

**Birds**—*Budgerigars—confinement in small cages*

STARLING *v.* BROOKS [1] (Q.B. Divisional Court: Lord Goddard C.J., Jones and McNair JJ.: May 1, 1956) (*The Times*, May 2, 1956).

S., a pet-shop proprietor, took delivery of some budgerigars on approval with a view to their purchase. The birds were delivered to his shop at 9 a.m., when an assistant fed and watered them, but left them in their cages. The cages used were standard show cases for budgerigars and were frequently used for their conveyance. They measured 13½ inches long by 12 inches high and 6½ inches from back to front. Two perches ran from the front to the back. If the birds tried to stretch their wings horizontally they would be unable to do so freely while sitting on the perches. At about midday S. approved the birds and decided to purchase them, and moved them from the cages into a larger " flight " cage. On a charge under section 8 (1) of the Protection of Birds Act, 1954 ([1954] Crim.L.R. 639), quarter sessions, being of opinion that S. kept and confined the birds in the cages which were not sufficient in height, length and breadth to permit the birds to stretch their wings freely, and that the birds were not in the course of conveyance after S. had taken delivery of them, convicted S. and fined him £2 on each of four informations and ordered him to pay six guineas costs. On appeal:—

*Held*, dismissing the appeal, that the facts that the birds did not belong to the appellant and were in cages which were not his, in circumstances in which it would have been a breach of contract for him to have taken them out, were immaterial when considering whether the birds were " confined " within the meaning of section 8 (1). They were confined by the person in whose physical possession they were at the time, and this was a question of fact. Whether the birds could " freely " stretch their wings, and whether the birds were " in the course of conveyance " within the proviso to section 8 were likewise questions of fact, and as there was material on which quarter sessions could come to the conclusion to which they did there was no ground for interfering with their decision.

*Per* Lord Goddard C.J.: I agree with the decision with considerable reluctance because I do not think that this is the type of case with which the Act was meant to deal. Birds could be sent from Penzance to Caithness in such cages and also be exhibited at shows in such cages (for 72 hours, section 8 (1) (*b*)) without an offence being committed. [J. D. P.]

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[1] For the appellant: *Gerald Gardiner Q.C.*, *Stephen Terrell* (instructed by Beaumont, Son & Rigden). For the prosecutor: *Dudley Collard* (instructed by John Hall).

COMMENTARY. It may be wondered whether prosecutions for wholly technical offences such as this foster respect for the objects of the R.S.P.C.A.

It is worth recording the headnote to the report of this case in *The Times*: "Kindness to budgerigars: Mr. Starling loses."

**Certiorari**—*Mistaken plea of guilty.* See R. *v.* CAMPBELL, *ex p.* NOMIKOS, p. 485, below.

**Coroner**—*Application to quash verdict of suicide—evidence*

*Re* LAWRENCE [2] (Court of Appeal: Singleton, Morris and Romer L.JJ.: May 15, 1956) (*The Times,* May 16, 1956).

A boy aged seventeen was found in bed mortally wounded with a revolver shot in his head. He had been interested in guns for many years and possessed some revolvers, a shot-gun and a rifle. On the morning of his death his mother took him breakfast in bed and said he seemed quite happy. At 9.30 his sister heard a shot and found him sitting up in bed with his glasses on and blood running down his face. At the inquest the jury returned a verdict of suicide while the balance of the boy's mind was disturbed. The boy's father applied under section 6 of the Coroners Act, 1887, to the Divisional Court for leave to apply for an order of certiorari to quash the verdict of the jury on the ground that there was no evidence to support the verdict and that there was an insufficient inquiry. The Divisional Court refused the application, but on April 16, 1956, the Court of Appeal, [1956] Crim.L.R. 410, reversed this decision and gave leave to move for the order.

*Held,* refusing the application, that the evidence showed that the revolver must have been held close to the head and it was impossible to say that there was no evidence on which the jury's verdict could be founded. [J. D. P.]

COMMENTARY. This case may be compared with *R.* v. *Horner, ex p. Jones,* below, where a verdict of suicide was quashed. The rules guiding the court when considering an application under section 6 of the Coroners Act, 1887, were defined by Talbot J. in *R.* v. *Divine, ex p. Walton* [1930] 2 K.B. 29, 37. If there is a real risk that justice has not been done, a verdict of suicide will be quashed.

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[2] For the applicant: *Philip Cox* (instructed by Rising & Ravenscroft for H. E. Wynschenk & Co., Birmingham). For the coroner: *R. J. Parker* (instructed by Sharpe, Pritchard & Co., for Town Clerk, Birmingham).

**Coroner**—*Application to quash verdict of suicide—verdict not supported by evidence*

R. *v.* HORNER, *ex p.* JONES[3] (Court of Appeal: Singleton, Morris and Romer L.JJ.: May 15, 1956) (*The Times*, May 16, 1956).

J., a coal miner, was killed when shot-firing was taking place at a coal mine where he was working. He had been engaged with D., a shot-firer, and another man in extending the size of a refuge hole on a main road in the mine. D. posted J. about 33 yards away from the refuge having first charged six holes and explained what he was going to do. D. fired four shots, which were effective, and then went and told J. that he intended to fire another two charges. He then went down the road, shouted " Fire " and fired the last two shots. When he returned he found J. lying dead in front of the refuge. At the inquest there was evidence that J. had been in a happy mood that night. No explanation could be given why he should return to the refuge hole. There was evidence that his married life had not been very happy of late, but he had never been heard to threaten to take his own life. The jury returned a verdict that J. committed suicide while the balance of his mind was disturbed. On appeal by the widow from a refusal of the Divisional Court to grant an order of certiorari to quash that verdict:—

*Held,* allowing the appeal, that it was the jury's duty to return a verdict on the evidence and, if they were in doubt, they should return an open verdict. In the present case there was no evidence to show that J. committed suicide or that the balance of his mind was disturbed; the inquisition would be quashed and a new inquest ordered before a different coroner. [J. D. P.]

COMMENTARY. This case may be compared with *Re Lawrence,* above, where the court refused to quash a verdict of suicide.

**False Imprisonment**—*Justices acting outside their jurisdiction—limitation of action*

O'CONNOR *v.* ISAACS[4] (Court of Appeal: Singleton, Morris and Romer L.JJ.: April 30, 1956) ([1956] 3 W.L.R. 172; [1956] 2 All E.R. 417).

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[3] For the applicant: *Desmond Ackner* (instructed by Rider, Heaton, Meredith & Mills for Thatcher & Hallam, Midsomer Norton). The coroner did not appear and was not represented.

[4] For the plaintiff: *N. R. Fox-Andrews Q.C., R. L. Bayne-Powell* (instructed by George C. Carter & Co.). For the justices: *G. G. Baker Q.C., David Wacher* (instructed by Wilkinson, Howlett & Moorhouse).

In 1941, O. was ordered by justices to pay maintenance to his wife and child. The order was varied from time to time by other justices and terms of imprisonment were imposed for non-compliance. The last term of imprisonment occurred in 1945. In 1954, O. appealed to the Divorce Divisional Court against the maintenance orders and they were quashed. In an action against the justices for damages for false imprisonment and for money paid by the plaintiff under orders made by them without jurisdiction while sitting as justices, it was conceded that the justices had no jurisdiction to make the original order. Diplock J. held that the action for false imprisonment was barred by section 21 of the Limitation Act, 1939, and that the plaintiff could not recover the money paid. On appeal:—

*Held*, affirming [1956] Crim.L.R. 261, that even if the proviso to section 2 of the Justices' Protection Act, 1848, which provided that no action should be brought for anything done under a conviction or order until such conviction had been quashed, could be interpreted as requiring an order to be quashed before an action could be brought the causes of action for false imprisonment were not dependent on the quashing of any order but arose at the time of imprisonment in each case. The latest imprisonment was in 1945 and, accordingly, the action was barred by section 21 of the Limitation Act, 1939. As to the claim for damages for money paid by the plaintiff, any claim with regard to money paid more than a year before the passing of the Law Reform (Limitation of Actions) Act, 1954, which repealed section 21 of the Act of 1939, was barred. As regards money paid after that date, injury only occurred to the plaintiff when he paid the money he was under no legal liability to pay; such a payment was an act of the plaintiff and not an act done by the justices rendering them liable to damages under section 2 of the Justices' Protection Act, 1848. Apart from the statute no right of action against the justices existed at common law. [J. D. P.]

COMMENTARY. The effect of the decision in the Court of Appeal is the same as that reached by Diplock J.

**Highways**—*Being found drunk in the highway—whether defendant must also be found incapable of taking care of himself*

MARSHALL *v.* LLOYD[5] (Harrow Magistrates' Court: April 30, 1956).

The defendant was charged with being found drunk in the highway contrary to section 12 of the Licensing Act, 1872. He pleaded not guilty. The police constable prosecuting gave evidence that following a collision, he and a colleague had occasion to speak to the driver of a motor-car, and that the defendant, who was a passenger in the car, got out and wandered across the road to his own danger and the obstruction of traffic. He was brought back to the side of the road, noticed to be unsteady on his feet and smelling of drink, and advised to sit in the car. He again wandered into the roadway, and, being considered to be drunk and incapable of taking care of himself, was arrested and taken to the police station. During the cross-examination, defence counsel suggested that the charge was one of being drunk and incapable, and that both drunkenness and incapability had to be proved in order to constitute an offence. The clerk pointed out that the defendant had been charged in court with being found drunk in the highway and had pleaded to that charge. Counsel replied that the police charge sheet specified not only drunk but also " and incapable of taking care of himself," and that the court list said " drunk and incapable " ; he was unable to agree that the only matter before the court was whether or not his client was drunk in the highway. The police asked that the case be adjourned to enable legal representation to be obtained and the bench agreed. At the adjourned hearing further evidence was called by the prosecution, and the defendant gave evidence and called witnesses. Counsel for the defendant repeated his former submission. Counsel for the police argued that the words " incapable of taking care of himself " on the charge sheet were useful as indicating why the defendant was arrested, but were quite extraneous as far as the offence itself was concerned, and he invited the court to treat them as a surplusage.

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[5] For the prosecution: *Alastair Morton* (instructed by the Solicitor, Metropolitan Police). For the defendant: *David Fairbairn* (instructed by Avery, Son & Fairbairn).

*Held,* accepting the contention of the police, that the proper charge under section 12 of the Licensing Act, 1872, was one of being drunk in the highway. The defendant was fined 10s.

Counsel for the police informed the court that the total costs including doctor's fees were upwards of £16, and the court ordered the defendant to pay £10 10s. costs.

[O. Cargill, *Clerk to the Justices.*]

COMMENTARY. The Licensing Act, 1872, s. 12, provides: " Every person found drunk in any highway . . . shall be liable to a penalty not exceeding ten shillings." The Licensing Act, 1902, s. 1, provides: " If a person is found drunk in any highway . . . and appears to be incapable of taking care of himself, he may be apprehended and dealt with according to the law." It is clear that under section 12 of the Act of 1872 there is no necessity to prove incapability. Section 1 of the Act of 1902 is complementary to section 12 and it only gives a constable power to arrest a person found drunk in certain circumstances, *i.e.,* where he appears to be incapable; it does not create a further offence. In *R.* v. *Governor of Holloway Prison* (1916) 85 L.J.K.B. 689, it was held that there is no necessity for the exact language of an Act under which a person is charged to appear in a charge sheet. It is enough if the words in the charge sheet are sufficient to embody the elements of the offence which is created by the statute.

**Indecent Exposure**—*Summary trial.* See EVANS *v.* ROGERS, p. 496, below.

**Indictment**—*Receiving.* See R. *v.* BROOKER, p. 489, below.

**Magistrates**—*Limitation of action against.* See O'CONNOR *v.* ISAACS, p. 482, above.

**Merchant Shipping**—*Cargo—timber deck cargo loaded to above prescribed height*

R. *v.* CAMPBELL, *ex p.* NOMIKOS [6] (Q.B. Divisional Court: Lord Goddard C.J., Cassels and Donovan JJ.: April 27, 1956) ([1956] 1 W.L.R. 622; [1956] 2 All E.R. 280).

The master of a vessel was charged on two informations under regulation 5 (*b*) of the Timber Cargo Regulations, 1932, that (a) the height of that part of the timber deck cargo carried on the foredeck, and (b) that part of the timber deck cargo carried on the raised quarter-deck was in excess of the permitted height. At the magistrates' court the master pleaded guilty to both charges and was fined £500 and £250 respectively. He applied for an order of certiorari to quash the conviction on the second charge, contending that although the timber deck cargo was divided between the foredeck and the raised quarter-deck, there was in fact only one cargo and one deck for the purpose of the regulations, therefore there was only one offence and the magistrate had no jurisdiction to convict on the second charge.

*Held* (1) that, having regard to the definition of " timber deck cargo " in regulation 1 (2) of the regulations, there was only one timber cargo stowed on a superstructure deck and, therefore, only one offence had been committed. (2) The remedy of certiorari was only available where the magistrate had acted outside his jurisdiction. In the present case there was clearly jurisdiction, and the fact that there should have been only one information was a matter of defence to the second information; the defendant should have pleaded not guilty, and then if he had been convicted on the second charge the proper remedy would have been by way of appeal; but, the defendant having pleaded guilty the magistrate had no option but to convict. (3) Even if certiorari had been available to the defendant, it was a discretionary remedy, and since the defendant had pleaded guilty certiorari would be refused on that ground also. [J. D. P.]

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[6] For the defendant: *Michael Summerskill* (instructed by Richards, Butler & Co.). For the magistrate: *Rodger Winn* (instructed by the Treasury Solicitor).

COMMENTARY. Timber deck cargo is defined in the regulations as "a cargo of timber carried on an uncovered part of a freeboard or superstructure deck, but does not include a cargo of wood pulp or similar substance."

No appeal lies to quarter sessions against conviction in a magistrates' court where the defendant has pleaded guilty (Magistrates' Courts Act, 1952, s. 83). In an earlier case, *R.* v. *West Kent Quarter Sessions Appeal Committee, ex p. Files* [1951] 2 All E.R. 728, Lord Goddard C.J. said *obiter*: "Whether or not there is any remedy if a man pleads Guilty under some genuine misapprehension, does not really fall for decision, but I am inclined to think that the remedy, if any, is certiorari, but it would certainly take a very strong case to give rise to it." In the present case one of the grounds for refusing certiorari was that the court knew "of no case where a plea of guilty has been entered and certiorari has been granted." It appears, therefore, that a person mistakenly pleading guilty in a magistrates' court will only have a remedy in the most exceptional case.

See Stone, 88th ed., 261.

### **Murder**—*Retrial—use of judge's notes*

RAMLOCHAN *v.* R.[7] (Judicial Committee of the Privy Council: Lords Oaksey, Tucker and Keith of Avonholm: May 14, 1956) ([1956] 3 W.L.R. 117).

The body of a girl aged about thirteen, who was the wife of the appellant, was found about 100 yards from the appellant's house decapitated by some instrument such as a cutlass. There was no eye-witness of the murder and it was never discovered where she was murdered. The appellant, who relied on an alibi, was first tried in March, 1955, when the jury disagreed. He was convicted at a retrial on May 18, 1955. On appeal from a judgment of the Court of Criminal Appeal of Trinidad and Tobago, the appellant contended that he had been prejudiced in his defence at the second trial through his counsel being refused access to the judge's notes of the first trial. Another ground of appeal was that in the middle of the cross-examination of the appellant prosecuting counsel put questions suggesting that the blow was struck not by the appellant but by a named man, who was not on trial, and that the appellant was aiding and abetting, a point of which, it was alleged, there was no supporting evidence and one which it was too late to take.

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[7] For the appellant: *T. O. Kellock, Sirimevan Amerasinghe* (instructed by T. L. Wilson & Co.). For the Crown: *D. A. Grant* (instructed by Charles Russell & Co.).

*Held,* dismissing the appeal, (1) that no provision was made by the laws of Trinidad and Tobago for the taking of shorthand notes of the proceedings at the trial of a person on indictment and, apart from statutory provision, no right existed to access to a judge's notes in a previous trial; (2) that the Crown was not bound to state its theories based on inferences from the evidence in advance, and on the evidence it was impossible to hold that if the appellant was present at the murder he was not at least aiding and abetting. [J. D. P.]

COMMENTARY. This case has little relevance for English lawyers as in English law where there is a re-trial the fact of a previous trial or hearing is irrelevant: Phipson on *Evidence*, 9th ed. 48, citing *Sambasivam* v. *Public Prosecutor, Federation of Malaya* [1950] A.C. 458.

**Police**—*Road Traffic—police car answering call failing to accord precedence to pedestrian on crossing*

LOCKIE *v.* SOPPITT [8] (Nottingham Magistrates' Court: A. E. Greenaway, Esq., Chairman: April 23, 1956).

A police constable pleaded not guilty to a summons for failing to accord precedence to a foot passenger on a pedestrian crossing contrary to regulation 4 of the Pedestrian Crossings Regulations, 1954. Evidence was given that a workman, who was stone deaf, was about halfway across a pedestrian crossing when he was knocked down by a police car driven by the defendant. The defendant stated that in response to a burglar alarm he was driving to the scene of the alleged crime. As he approached the pedestrian crossing his speed was approximately 50 miles per hour. There was no vehicle or pedestrian about and it seemed safe to travel at that speed. He was short of the pattern of studs on the approach to the crossing when he saw a man step off the pavement. He realised the man had not seen him but thought he would hear the tyres on the road and the approach of the vehicle. He waited to see what the man would do so that he could decide which way to steer his vehicle. The man came straight on and appeared totally unaware of the car. The defendant swerved and applied his brakes, but could not avoid striking the pedestrian. Evidence was given that it was defendant's duty to make the best possible speed to the scene of the alarm.

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[8] For the prosecution: Mr. G. Guest, Solicitor. For the defendant: Mr. A. L. Mason, Solicitor.

*Held*, the defendant was guilty. He was fined £1 and ordered to pay £2 19s. 6d. costs.

[Maurice Smallwood, *Deputy Clerk to the Justices*.]

COMMENTARY. Police cars must observe the same traffic regulations as other vehicles unless they are specifically exempted from doing so, as, for instance, they are exempted from observing the speed limit in certain circumstances by section 3 of the Road Traffic Act, 1934. This may cause difficulties, particularly if police regulations concerning police vehicles do not accord with the law applying to road traffic: see the remarks of Lt.-Col. W. E. Batt in a case at Old Street Magistrates' Court: [1955] Crim.L.R. 593. In *Leicester* v. *Pearson* [1952] 2 Q.B. 668 it was held that the finding that there had been no negligence on the part of the driver provided a complete defence to a charge of failing to accord precedence brought under the previous Regulations. However, in *Gibbons* v. *Kahl* [1956] 1 Q.B. 59, the previous case was distinguished and it was pointed out that it was a special case decided on the facts. The duty of a motorist approaching a pedestrian crossing is to be able to stop before he gets there unless he can see that there is nobody on the crossing: *Gibbons* v. *Kahl.*

See Stone, 86th ed., 2829.

**Privy Council**—*Appeal to—miscarriage of justice—onus of proof*

KARAOLIDES *v*. R.[9] (Judicial Committee of the Privy Council: Lords Goddard, Oaksey, Tucker, Keith of Avonholm and Somervell of Harrow: May 1, 1956) (*The Times,* May 2, 1956).

Following a political meeting in Cyprus, three men surrounded a police-constable, who was standing in the street, and one of them shot him dead. The man who fired the shots rode off on a bicycle, but a bystander threw another bicycle in his path knocking him off and he then ran away. The appellant, who was charged with the murder and who pleaded an alibi, admitted that he went into hiding after the murder. When arrested he was put up for identification and identified by two witnesses. At the trial a number of documents were given in evidence with a view to connect the appellant with terrorist activities of a certain part of the population of Cyprus. On appeal from his conviction of murder:—

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[9] For the appellant: *D. N. Pritt Q.C., D. A. Grant* (instructed by Bischoff & Co.). For the Crown: *Gerald Howard Q.C., J. G. le Quesne* (instructed by Charles Russell & Co.).

*Held*, dismissing the appeal, that it was a principle of the proceedings of the Board that it was for the appellant in a criminal appeal to satisfy the Board that a real miscarriage of justice had occurred, and the mere admission of incompetent evidence, not essential to the result was not a ground for allowing an appeal. In the present case, although the documents were inadmissible, in view of his identification, his conduct in going into hiding and the admissible evidence against him, a miscarriage of justice had not been established and the conviction should be affirmed. [J. D. P.]

COMMENTARY. This decision accords with well-established practice: see *Dal Singh* v. *The King-Emperor* (1917) 33 T.L.R. 249, where the Privy Council dismissed an appeal against a conviction for murder made on the ground that the Appeal Court had used certain diaries for the purpose of testing evidence in a way contrary to law. There is a difference between those cases where the admission of inadmissible evidence affects merely the weight of the evidence, as in the present case, and those where it results in a substantial miscarriage of justice. In *Sambasivam* v. *Public Prosecutor, Federation of Malaya* [1950] A.C. 458 the Privy Council set aside a conviction where a statement was put in evidence which, if accepted as the truth, went to prove the accused guilty of a charge of which he had already been acquitted as clearly as it proved him guilty of the offence for which he was being tried. An appeal was also allowed where hearsay evidence had been introduced for the purposes of identification: *Teper* v. *R.* [1952] A.C. 480.

### **Receiving**—*Possession of stolen goods—aiding another in transportation of stolen goods*

R. *v*. BROOKER [10] (Court of Criminal Appeal: Lord Goddard C.J., Jones and McNair JJ.: April 30, 1956).

B. was convicted at Middlesex Sessions of receiving stolen property and was sentenced to six months' imprisonment. The facts, shortly, were that A. stole a vacuum cleaner from a flat, and B. helped A. to carry the vacuum cleaner to a shop. B. admitted that he knew the vacuum cleaner had been stolen. He appealed to the Court of Criminal Appeal against his conviction on the ground that the jury were misdirected on the question of receiving. It was contended that the learned Deputy Chairman was wrong in directing the jury as follows:—"There is evidence of receiving and no contest about it; you have had a long argument about it, but in fact he himself admits that he received it, in law. If you carry goods which are stolen, or if you carry goods which are not stolen, you receive them; you are in possession of them; you may be in joint possession with the more closely concerned person who is with you, but you are in possession of them."

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[10] For the appellant: *A. F. Waley* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *H. J. Leonard* (instructed by the Solicitor, Metropolitan Police).

*Held,* allowing the appeal, that the question of possession was a pure question of fact for the jury, upon which they should have received a direction. In effect, the learned Deputy Chairman withdrew that question from the jury and decided it for them. That was clearly a misdirection. This was not a case in which the proviso to section 4 (1) of the Criminal Appeal Act, 1907, ought to be applied, as it was by no means certain that the jury would have found a verdict of guilty if they had received a proper direction, although there was evidence on which they could have done so. The appeal would, therefore, be allowed.

*Per* McNair J.: In a case of this sort where there is some question as to whether the man is merely acting as a porter or assistant, and without any evidence that he is going to share in the proceeds, it is very desirable that there should be included, in addition to the receiving count, a count charging the accused man with being an accessory after the fact to the original theft. [H. P.]

COMMENTARY. To sustain an indictment for receiving proof of some form of possession is essential. Thus where a man negotiated for the sale of goods which he knew had been stolen it was held he could not be convicted of receiving unless it was also proved that he had been in possession or control of the goods: *R.* v. *Watson* [1916] 2 K.B. 385. Where stolen property was found in the back room of a house and two men who were seen near the room concealed themselves when the police arrived there was held to be insufficient evidence to sustain an indictment for receiving. "It had to be established not that they were going to assume control or take possession of the goods, but that they had actually done so": *R.* v. *Freedman* (1930) 22 Cr.App.R. 133. In *R.* v. *Flatman* (1913) 8 Cr.App.R. 256 the Court of Criminal Appeal quashed a conviction for receiving because the question whether the appellant was ever in possession of the stolen goods had not been left to the jury, and in *R.* v. *Crane* (1912) 7 Cr.App.R. 113 such a conviction was quashed because there was not a proper direction in the summing up on the question of possession.

Where a person is indicted as a principal he cannot be convicted upon the indictment if the evidence shows that he was merely an accessory after the fact: *R.* v. *Fallon* (1862) L. & C. 217.

See Archbold, 33rd ed., 778, 783.

**Road Traffic**—*Driving tractor on highway while under age—charge*

POLICE *v.* X (AGED 10)[11] (Chippenham Juvenile Court: W. E. Vince, Esq., Chairman: March 27, 1956).

A boy, aged ten, was charged with driving an agricultural tractor on the highway while under the age of twenty-one contrary to section 9 (3) of the Road Traffic Act, 1930, and with driving while uninsured. It was proved that the boy had driven the tractor for a few yards on a public highway which was not a " through road " and which passes his father's farm. At the close of the case for the prosecution it was submitted by the defence that with regard to the first charge the boy had been charged under the wrong subsection of the Road Traffic Act, 1930. It was argued that he should have been charged under section 9 (1) with driving a motor-vehicle on a road while under sixteen years of age.

*Held,* that the boy should have been charged under section 9 (1) and the first charge was dismissed. He was fined £2 for driving when uninsured, but as he drove only a few yards from the gateway of the farm onto the highway which was not a through road, and as he was only ten, there were special reasons for not disqualifying him.

[S. W. H. Dann, *Clerk to the Justices.*]

COMMENTARY. Section 9 (3) of the Road Traffic Act, 1930, does not apply to a tractor used primarily for work on land in connection with agriculture. It would appear that the proper interpretation of section 9 is that subsection 9 (1) prohibits a person under sixteen years of age from driving any motor vehicle, while subsection 9 (3) imposes certain restrictions on persons aged between sixteen and twenty-one. Section 35 of the Road Traffic Act, 1930, imposes an absolute prohibition on driving a motor vehicle on a road while uninsured (*Lyons* v. *May* [1948] 2 All E.R. 1062) and an offender must be disqualified unless the magistrates find special reasons for not doing so. Such reasons must be special to the offence and not to the offender: *Whittall* v. *Kirby* [1947] K.B. 194. In *Reay* v. *Young* [1949] 1 All E.R. 1102 where a man allowed his wife, who did not hold a driving licence, to drive a car a little way on a lonely road among the special reasons found for not disqualifying them was the fact that the wife drove only for a short distance. However, in *Davidson-Houston* v. *Lanning* [1955] 1 W.L.R. 860 Lord Goddard C.J., speaking of a person driving while uninsured, said *obiter*: " The fact that he only drives a little way ought never to influence justices. I have often quoted a case in which a young man drove a vehicle a few hundred yards and in that space injured one man for life, another seriously, and broke a plate glass window worth £100." Since the boy in the present case was only ten he was in any case disqualified from driving, and to disqualify him again seems pointless as was remarked by the justices. But his age was a circumstance special to the offender not to the offence and would not by itself have constituted a special reason justifying the magistrates in exercising their discretion.

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[11] For the defendant: Mr. E. J. Finch, Solicitor.

**Road Traffic**—*General trade licence—prosecution by council other than one issuing licence*

R. *v.* REIGATE JUSTICES, *ex p.* HOLLAND[12] (Q.B. Divisional Court: Lord Goddard C.J., Jones and McNair JJ.: April 30, 1956) ([1956] 1 W.L.R. 638; [1956] 2 All E.R. 289).

The applicant, an officer of the Surrey County Council, on the authority of the council, laid two informations against the driver of a vehicle, who was apprehended in Surrey, charging him with using a general trade licence issued by the Hampshire County Council in respect of a general trade plate on an unregistered goods vehicle for a purpose contrary to regulation 29D (3) of the Road Vehicles (Registration and Licensing) Regulations, 1953, and sections 15 (1) and 25 of the Vehicles (Excise) Act, 1949. The justices dismissed the informations, being of opinion that the only authority competent to lay the informations was the county council which had issued the general trade licence. On a motion for an order of mandamus:—

*Held,* allowing the application, that section 8 (2) of the Act of 1949 had transferred to county councils all the powers which the Commissioners of Customs and Excise had with regard to the levying and collection of vehicle duties and the prosecution of offenders for breaches of the regulations relating to those duties, and that there was no limitation on the right of the council to prosecute in respect of an offence committed within the county.

*Quaere,* whether the county council could prosecute if the offence had been committed in another county. [J. D. P.]

COMMENTARY. Section 8 (2) of the Vehicles (Excise) Act, 1949, provides that county councils and their officers shall have within their county the duties regarding the issue and cancellation of excise licences previously vested in the Commissioners of Customs and Excise and that "all enactments relating to those duties and to punishments and penalties in connection therewith shall apply accordingly." This case rested on the interpretation of a number of statutes and orders. The offence committed was being committed in the county where the vehicle was stopped and not at that particular moment in the county where the licence had been issued.

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[12] For the applicant: *F. H. Lawton* (instructed by Wyatt & Co.). For the justices: *P. W. Medd* (instructed by Neish, Howell & Haldane).

**Road Traffic**—*Police cars.* See LOCKIE *v.* SOPPITT, p. 487, above.

**Road Traffic**—*Public service vehicle—conductor permitting standing passengers in excess of authorised number*

SPIRES *v.* SMITH [13] (Q.B. Divisional Court: Lord Goddard C.J., Jones and McNair JJ.: May 1, 1956) ([1956] 1 W.L.R. 601; [1956] 2 All E.R. 277).

A bus conductor was convicted under regulation 4 of the Public Service Vehicles and Trolley Vehicles (Carrying Capacity) Regulations, 1954 (S.I. No. 1612) of permitting a stage carriage to be used to carry passengers in excess of the maximum number permitted by the regulations. The justices found that the bus was carrying as standing passengers fifteen adults and three children. On appeal:—

*Held,* allowing the appeal, that regulation 4 made it an offence to carry standing passengers in excess of the permitted number, and, since it was not the conductor, but the owner of the vehicle, who carried the passengers, the conductor could not be guilty of "permitting" the carriage of passengers, but should have been charged with aiding and abetting the commission of the offence. [J. D. P.]

COMMENTARY. It is not made clear in the Regulations here alleged to be contravened who is responsible for preventing the carriage of excess passengers and where there is any ambiguity in a penal regulation it must be construed in favour of the defendant.

A person who aids and abets the commission by another of a summary offence is guilty of the like offence (Magistrates' Courts Act, 1952, s. 35) and a person may be convicted as an aider and abettor if he knew all the circumstances which constituted the offence, it being immaterial whether or not he knew that they did constitute an offence: *Carter Paterson and Pickfords* v. *Wessel* [1947] K.B. 849.

Prima facie a master is not responsible for the criminal acts of his servants, but if a prohibition is made absolute by legislation then the principal is liable if the act is in fact done by his servants: *Mousell Brothers* v. *London and North Western Ry.* [1917] 2 K.B. 836.

See Stone, 88th ed., 2836.

**Road Traffic**—*Traffic sign—failing to observe "yield right of way" sign*

LORD *v.* WOLLEY [14] (Slough Magistrates' Court: May 3, 1956).

The defendant was charged under section 49 (*b*) of the Road

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[13] For the appellant: *F. H. Lawton* (instructed by Gregory, Rowcliffe & Co. for Rigby, Williams & Co., Peterborough). For the prosecutor: *Neil McKinnon* (instructed by Treasury Solicitor).

[14] For the defence: H. W. Langford, Solicitor.

Traffic Act, 1930, with failing to observe a traffic sign directing drivers to yield right of way. It was alleged that he drove past the sign on to a service road running parallel with the Uxbridge road and collided with a car going towards Slough. The defendant said he did not stop at the crossing because he had not seen anything to stop for. He would have been prepared to stop at the main road, but not necessarily at the service road. The prosecutor explained that the sign placed on a driver approaching a road junction a responsibility to drive at a reasonable speed and to give right of way to all traffic which is so close as to constitute a danger.

*Held,* the defendant was guilty. He was fined £2.

[Joseph Davies, *Clerk to the Justices.*]

Commentary. The yield right of way signs are of American origin. Their use has been authorised by the Ministry of Transport and Civil Aviation in the road safety experiment being carried out at Slough.

**Sentence**—*Imprisonment—reduction*

R. *v.* Loney [15] (Court of Criminal Appeal: Lord Goddard C.J., Jones and Pearson JJ.: May 14, 1956) (*The Times,* May 15, 1956).

L. was sentenced at Gloucester City Sessions to five years' imprisonment for being found by night with housebreaking implements. The facts were that L. climbed over a wall into a yard where there was a warehouse and took up a brick. A police officer found him with the brick in his hand. L. was drunk at the time. He had a number of previous convictions, including one for which he had been sentenced to corrective training. He was last released from prison in 1952. L. applied to the Court of Criminal Appeal for leave to appeal against his sentence:—

*Held,* treating the application as an appeal and reducing the sentence, that the recorder had not given sufficient weight to the fact that L. had, after a sentence of corrective training, kept out of trouble for three years, and did not appreciate that the offence was not a premeditated one. L. had taken up the brick, which was alleged as the housebreaking implement, on the spur of the moment and while under the influence of drink. In the circumstances, the sentence would be reduced to one of eighteen months' imprisonment. [H. P.]

Commentary. Where an implement is capable of being used for the purposes of housebreaking it is a question for the jury whether the person found in possession of it by night had it without lawful excuse and with the intention of using it as a housebreaking implement: *R.* v. *Oldham* (1852) 2 Den. 472.

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[15] The applicant did not appear and was not represented. The Crown was not represented.

**Sentence**—*Preventive detention—substitution of term of imprisonment*

R. *v.* JENNER [16] (Court of Criminal Appeal: Lord Goddard C.J., Jones and Pearson JJ.: May 14, 1956) (*The Times,* May 15, 1956).

J. was sentenced at Gloucester County Sessions to seven years' preventive detention for larceny of a pair of shoes worth 32s. The shoes were stolen from a fellow lodger in a hotel, and J. sold them the following day for 7s. 6d. J. had a bad record with sixteen convictions since 1942. He applied to the Court of Criminal Appeal for leave to appeal against his sentence: —

*Held,* treating the application as an appeal and reducing the sentence, that all J.'s previous sentences were short ones. In 1951 he had been sentenced to eighteen months' imprisonment for stealing a coat, and in 1953 to three years for stealing a pipe. It appeared likely that he would commit a crime as soon as he was released from prison, but at the same time it seemed to the court that seven years' preventive detention was too much for an offence of stealing something worth 32s. Accordingly, the sentence would be reduced to eighteen months' imprisonment. [H. P.]

**Sentence** — *Preventive detention — substitution of sentence of imprisonment*

R. *v.* SHELDON [17] (Court of Criminal Appeal: Lord Goddard C.J., Jones and McNair JJ.: April 30, 1956).

S., together with M., pleaded guilty at Manchester Assizes to an offence of robbery with violence, and was sentenced to eight years' preventive detention. M. was sentenced to five years' imprisonment. The facts were that S. and M., together with two others, drove up to the house of an elderly man and knocked on the door. When the door was opened, the men pushed their way into the house, knocking the old man down on the floor by striking him on the forehead. He was then tied up and gagged, and hit and kicked. The men threatened to burn the house down and placed paper round the legs of the old man and set light to it. As a result of the attack the old man was detained in hospital for some three weeks. Money and property valued at £25 was stolen from the house. The police did not regard S. as the ringleader. S. had nine previous convictions, most of them for offences of shop-breaking and larceny, and had received sentences of imprisonment on three occasions. His last conviction was in October, 1952, when he was put on probation for two years. S. appealed to the Court of Criminal Appeal against his sentence:—

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[16] The applicant did not appear and was not represented. The Crown was not represented.

[17] The appellant appeared in person. The Crown was not represented.

*Held,* reducing the sentence, that this was a monstrous case of robbery with violence and clearly one in which a substantial sentence ought to be imposed. But the court would take into account the fact that S. had kept out of trouble since October, 1952, and that he undoubtedly behaved well during the period of probation which was then imposed. The court thought that S. took a less serious part in the robbery and the assault than the others, and in the circumstances would reduce his sentence to one of five years' imprisonment. [H. P.]

**Suicide**—*Application to quash verdict of.* See *Re* LAWRENCE, p. 481, above; R. *v*. HORNER, *ex p*. JONES, p. 482, above.

**Vagrancy** — *Indecent exposure — summary trial — evidence of indecent assault*

EVANS *v*. ROGERS[18] (Q.B. Divisional Court: Lord Goddard C.J., Cassels and Donovan JJ.: April 25, 1956).

The appellant was charged with indecent exposure contrary to section 4 of the Vagrancy Act, 1824, and convicted. On appeal to quarter sessions he contended that the evidence adduced did not disclose a case of indecent exposure although it did disclose a prima facie case of indecent assault, and that by preferring a charge under the Act of 1824 the appellant was deprived of the right to trial by jury. The appellant relied on *R.* v. *Dean* (1924) 18 Cr.App.R. 133, *R.* v. *Cadwell* (1927) 20 Cr.App.R. 60 and *Beal* v. *Kelley* (1951) 35 Cr.App.R. 128. Quarter sessions were of the opinion that the evidence prima facie disclosed both indecent assault and indecent exposure the latter being, on the facts, an ingredient of the former; that the first two cases cited referred to the undesirability of a charge being laid under the Vagrancy Act when the true nature of the offence was an attempt to commit a more serious offence; that they did not establish that such a charge could not legally be laid or that a conviction on such a charge was bad in law. Accordingly, they dismissed the appeal. On appeal:—

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[18] For the appellant: *D. Pt. Draycott* (instructed by Ward, Bowie & Co. for David Stephenson, Brierley Hill). For the respondent: *Stephen Brown* (instructed by Bentleys, Stokes & Co. for Turner, Bayley & Co., Dudley).

*Held*, dismissing the appeal, that if the facts showed that the appellant had committed a summary offence he could be charged with that only even though there was evidence on which he might have been charged with an indictable offence. It was clear that if the appellant was subsequently charged with indecent assault he could not plead *autrefois convict*. [J. D. P.]

COMMENTARY. "The Vagrancy Act of 1824 was not intended as a convenient method for supplying a hiatus in the evidence of felony." This is the principle, as stated by Talbot J. in *R.* v. *Cadwell*, on which both that case and *R.* v. *Dean* were decided. In the latter case the appellant was convicted of loitering with intent to commit a felony and deemed to be an incorrigible rogue. He was sentenced to nine months' imprisonment with hard labour. The Court of Criminal Appeal reduced this sentence to one of one day's imprisonment on the ground that it seemed as though there was not enough evidence to charge the appellant with attempted housebreaking so he was dealt with under the Vagrancy Act instead.

Indecent exposure is a misdemeanour indictable at common law, but the offence is now usually dealt with under section 4 of the Vagrancy Act, 1824, where there is an intent to insult a female. In urban areas it may be dealt with summarily under the Town Police Clauses Act, 1847, s. 28, and there is then no necessity to prove such an intent.

In *Beal* v. *Kelley* the Court of Criminal Appeal approved the definition of indecent assault given in Archbold, 32nd ed., 1067, namely "an assault accompanied with circumstances of indecency on the part of the prisoner."

See Archbold, 33rd ed., 1396.

# Acts and Orders

## Animals

EXPORTATION OF HORSES (MINIMUM VALUES) ORDER, 1956 (S.I. No. 780): operative June 4, 1956. Under section 37 of the Diseases of Animals Act, 1950, certain horses may not be exported from the United Kingdom to any port outside the United Kingdom, the Channel Islands and the Isle of Man if below a certain value.

These values are raised to £105 if the horse is a heavy draft horse, £100 if it is a vanner, mule or jennet, and £20 if it is an ass.

For penalties for contraventions, see section 79 of the Diseases of Animals Act, 1950.

### Armed Forces

CERTIFICATES OF ARRESTS AND SURRENDER OF DESERTERS AND ABSENTEES (ARMY) REGULATIONS, 1956 (S.I. No. 657): operative January 1, 1957. The certificates to be handed over when an absentee or deserter from the army is delivered into military custody are prescribed. There are two forms of certificate, one where the absentee or deserter is given into such custody as a result of proceedings in a court of summary jurisdiction, and one where he has surrendered himself to the police.

### Birds

WILD BIRDS (SOUTHPORT SANCTUARY) ORDER, 1956 (S.I. No. 692): operative June 1, 1956. Parts of the county borough of Southport and of the rural district of West Lancashire specified in the schedule to the order are declared a bird sanctuary. Subject to the provisions of the Protection of Birds Act, 1954, it is an offence for anyone wilfully to kill, injure or take any wild bird or to attempt to do so or to take or destroy an egg of any wild bird in the sanctuary.

The Wild Birds Protection (County Borough of Southport) Order, 1946 (S.R. & O., No. 2172) is revoked.

For penalties for contraventions, see section 12 (2) of the Protection of Birds Act, 1954.

### British Commonwealth

EMERGENCY POWERS (AMENDMENT) ORDER IN COUNCIL, 1956 (S.I. No. 731): operative May 19, 1956. The Order of 1952 (S.I. No. 2031) and the Emergency Powers (Nigeria) Order in Council, 1956 (S.I. No. 616; [1956] Crim.L.R. 430) are revoked. The term "governor" in the principal Order of 1939 is redefined. A governor may make emergency regulations for part of his territory. Schedule 1 to the Order of 1939, which lists the territories to which the Order applies, is amended.

### Customs and Excise

EXPORT OF GOODS (CONTROL) (AMENDMENT NO. 6) ORDER, 1956 (S.I. No. 789): operative June 11, 1956. The Order of 1955 (S.I. No. 518; [1955] Crim.L.R. 391) is amended. Licences are required for the export to all destinations of goods (subjected to any process of manufacture) wholly or mainly of aluminium or alloys mainly of aluminium.

### Emergency Laws

See EMERGENCY POWERS (AMENDMENT) ORDER IN COUNCIL, p. 498, above.

### Food and Drugs

See SCOTTISH MILK MARKETING BOARD (MODIFICATION OF FUNCTIONS) (REVOCATION) ORDER, p. 502, below.

### Intoxicating Liquors

LICENSING (AIRPORTS) ACT, 1956 (4 & 5 Eliz. 2, c. 37): operative June 17, 1956. The Minister of Transport and Civil Aviation may by order exempt licensed premises which are within the examination station of an airport at which there is a substantial amount of international passenger traffic from the prohibition against the sale of intoxicating liquor except during permitted hours. Before making such an order the Minister must satisfy himself that arrangements have been made for affording reasonable facilities on licensed premises within the examination station for obtaining beverages other than intoxicating liquor at all times when intoxicating liquor is obtainable. If it appears to the Minister after an order has been made that such arrangements are not being maintained, he may revoke the order.

### Limitation of Actions

See SOLICITORS (AMENDMENT) ACT, 1956, p. 503, below.

### London

LONDON QUARTER SESSIONS (JUVENILE COURT APPEALS) ORDER, 1956 (S.I. No. 790): operative May 25, 1956. Section 18 (4) of the Criminal Justice Administration Act, 1956, which concerns appeals to the county of London quarter sessions from juvenile courts, has effect in relation to any appeal entered by the clerk of the peace on or after June 25, 1956. Section 18 (4) provides that arrangements shall be made to secure that, so far as practicable, when an appeal from a juvenile court is to be heard by the court of quarter session for the county of London, members of a special section of the panel of justices nominated to hear appeals will be available to sit with the chairman of the court, and will not be less than half the justices so sitting. The special section of the appeals panel is to consist of justices nominated annually from amongst themselves by the justices who sit in juvenile courts in London.

The following Order has been made detailing a prescribed route: S.I. 1956, No. 656 (Westminster).

The following Order has been made prohibiting waiting: S.I. 1956, No. 792 (Riverhead, Kent).

The following Order has been made concerning unilateral waiting: S.I. No. 793 (Westminster).

### Pensions

PENSIONS (INCREASE) ACT, 1956 (4 & 5 Eliz. 2, c. 39): operative April 1, 1956. Certain pensions granted in respect of public service are increased. A number of pensions may be increased by the pension authority to the extent authorised by the Second Schedule to the Act. Among such pensions are a pension payable by the Secretary of State under the Police (Overseas Service) Act, 1945, or the Police Pensions Act, 1948, to a person who at the time of his retirement was engaged in police duties abroad or granted in consideration of the surrender of part of such a pension ; a pension payable under section 20 of the Sheriff Courts (Scotland) Act, 1907 ; a pension payable under the Police Magistrates (Superannuation) Acts, 1915 and 1929, and a pension payable under the enactments relating to the pensions of the Royal Irish Constabulary, except one payable under regulations made under section 1 of the Royal Irish Constabulary (Widows' Pensions) Act, 1954. Detailed provision is made to ensure that certain police pensions not directly increased by this or previous Pensions (Increase) Acts of 1944, 1947 and 1952, as amended, will receive corresponding increases.

### Police

See PENSIONS (INCREASE) ACT, 1956, above.

### Prisons

See PRISON (SCOTLAND) RULES, p. 502, below.

### Probation

See PROBATION (SCOTLAND) AMENDMENT RULES, p. 503, below.

## Road Traffic

ROAD VEHICLES LIGHTING (STANDING VEHICLES) (EXEMPTION) (GENERAL) REGULATIONS, 1956 (S.I. No. 741): operative June 5, 1956. Subject to prescribed conditions certain vehicles are exempted from showing the front and rear lights required to be shown at night by the Road Transport Lighting Acts, 1927 to 1953, when they are parked on roads outside the Metropolitan Police District and the City of London. The vehicles to which the regulations apply are passenger vehicles, goods vehicles, invalid carriages and motor and pedal cycles, whether they have a sidecar attached or not; no vehicle, however, is exempted if it is one to which section 7 of the Road Transport Lighting Act, 1927, applies (lighting of vehicles with overhanging or projecting loads) or if a trailer is attached to it (reg. 3).

Vehicles may be parked without lights in roads specified in a written consent given by the chief officer of police of the police area in which they are situate. Such roads will be marked by a prescribed traffic sign placed on the post or standard of the lamps or nearby. When parked in such roads vehicles are exempted from lighting requirements if (1) the left or near side of the vehicle is as close as may be and is parallel to the edge of the carriageway, or if the road is a one-way street, either the left or near side or the right or off side of the vehicle is as close as may be and parallel to the left or right hand edge of the carriageway; (2) no part of the vehicle is more than twenty-five yards from a street lamp, bearing the prescribed traffic sign or having such a sign near it, indicating that vehicles may be parked without lights; (3) the street lamp is illuminated throughout the time during which the vehicle is parked (no account being taken of any time during which the lamp is accidentally extinguished); (4) no part of the vehicle is within fifteen yards from any junction (reg. 4). Vehicles may be parked without lights in parking places or stands for hackney carriages only if the chief officer of police of the police area in which they are situate has given his written consent (reg. 6).

Vehicles may be parked with parking lights showing a white light to the front and to the rear a red light if (1) the left or near side of the vehicle is as close as may be and is parallel to the edge of the carriageway; (2) no part of the vehicle is more than one hundred yards from a street lamp, whether illuminated or not; (3) no part of the vehicle is within fifteen yards from any junction (reg. 7). The lights to be shown for the purpose of this regulation are a parking lamp or, alternatively, in the case of vehicles normally required by Road Transport Lighting Acts to show two front and two rear lamps, by the off-side front and rear lamps or, in the case of a vehicle normally required to show two front lamps and one rear lamp, by the off-side front lamp and by the rear lamp (reg. 8). The nature of parking lamps is prescribed. Every lamp must show a white light to the front and a red light to the rear; if it is circular it must have an illuminated area both to the front and to the rear of not less than one inch in diameter, and if it is not circular have such an illuminated area of not less than the area of a circle of one inch in diameter. Every parking lamp must be fixed to the off side of the vehicle so that no part of the vehicle or its equipment (other than a driving mirror or direction indicator) when the vehicle is standing or parked extends laterally on the off side more than twelve inches from the centre of either illuminated area of the lamp and so that no part of either illuminated area is less than fifteen inches nor more than six feet from the ground. Both lights must be clearly visible to an observer at any point on an arc extending ninety degrees from the longitudinal axis of the vehicle to the off side. An observer here means a person at any point thirty feet distant from the lamp whose eye level is not less than three feet six inches nor more than nine feet above the plane on which the vehicle is standing (reg. 9).

The regulations do not otherwise affect the law with regard to parking and obstruction. For penalties for their contravention, see section 10 of the Road Transport Lighting Act, 1927.

For the regulations which apply in the Metropolitan Police District and the City of London, see [1955] Crim.L.R. 656.

## Scotland

### *Food and drugs*

SCOTTISH MILK MARKETING BOARD (MODIFICATION OF FUNCTIONS) (REVOCATION) ORDER, 1956 (S.I. No. 722): operative May 19, 1956. The Order of 1940 (S.R. & O., No. 1717), which modified the functions and powers of the Scottish Milk Marketing Board under the Scottish Milk Marketing Scheme, 1933 (S.R. & O., No. 479), is revoked, but without prejudice to any proceedings for its contravention.

### *Prisons*

PRISON (SCOTLAND) RULES, 1956 (S.I. No. 671): operative May 4, 1956. Duke Street Prison, Glasgow, is no longer used as a prison and references to it in the Rules of 1952 (S.I. No. 565) are deleted. The number of counties from which prisoners may be committed to Barlinnie, Glasgow, and Greenock prisons are increased and the membership of the visiting committees of these two prisons revised.

*Probation*

PROBATION (SCOTLAND) AMENDMENT RULES, 1956 (S.I. No. 800): operative June 1, 1956. The pay of whole-time women probation officers is to be increased by stages until 1961, when it will be equal to that of men. Fresh provision is made concerning sick leave for whole-time probation officers.

*Sea fisheries*

SEA FISHERIES (SCOTLAND) BY-LAW (No. 53), 1956 (S.I. No. 721): operative May 12, 1956. The By-law (No. 52) of 1955 (S.I. No. 271), which permitted the use of a seine net for the capture of white fish within exclusive fishery limits round the Shetland Islands, is replaced. The new by-law does not prescribe the minimum mesh of nets to be used in the area and this is now subject to the Sea-Fishing Industry (Fishing Nets) Order, 1956 (S.I. No. 531 ; [1956] Crim.L.R. 434).

For penalties for contraventions, see section 4 of the Sea Fisheries (Scotland) Amendment Act, 1885.

## Sea Fisheries

See SEA FISHERIES (SCOTLAND) BY-LAW (No. 53), above.

## Solicitors

SOLICITORS (AMENDMENT) ACT, 1956 (4 & 5 Eliz. 2, c. 41): operative November 1, 1956. This Act amends the law relating to solicitors. Proceedings against a person who, not having in force a practising certificate, pretends to be a solicitor may be brought at any time within two years next after the commission of the offence or within six months next after the first discovery of it by the prosecutor, whichever period is the shorter (s. 8 (5)). Previously proceedings for such an offence had to be brought within six months after the commission of the offence.

# Practical Problems

*All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 3 Chancery Lane, London, W.C.2." The questions of subscribers only are answerable in the Review. All questions should be submitted in duplicate. The Publishers cannot accept any responsibility for the correctness of the replies.*

11. *Production of photographs by police*

We shall be obliged if you would let us know whether any authority can be given in support of an application to the prosecution for a copy of a set of photographs which it is intended should be placed before the court in a driving case in which we are concerned in the Magistrates' Court.

We are well aware that it is the practice of the police not to allow the defence a sight of any photographs that it is intended to put before the magistrates prior to the hearing. [C. W. C.]

ANSWER

I can find no authority to support such application to the police. The photographs are not in evidence until produced under oath by the officer responsible. However, I suggest that prior to the opening of proceedings a request should be made to counsel or prosecuting solicitor, who might well accord the defence the benefit of seeing photographs in advance. (N.B. That is done by courtesy —and not as of right!) [J. M. S.]

12. *Exemption from jury service*

I am responsible for the preparatory work for a Borough Quarter Sessions and a jury summons was served on a man whose name appeared in the current Register of Electors with a "J" against it. He wrote to say that twelve months ago he served as a juror at the local Assizes and that he was informed that it would be at least five years before he would be called on to serve as a juror again and that he did not think he was liable for service at Borough Quarter Sessions during the five year period. It has been found possible to excuse him from service at the next borough sessions because there will be more jurors available than are required. Is he, in your opinion, excused from service at Quarter Sessions during the five year period and, if so, should he produce a certificate of exemption? The only information I have come across on this subject is in Halsbury's *Laws of England,* 2nd ed., Vol. 19, p. 324. [M. T.]

ANSWER

There appears to be no legal basis for the practice referred to of judges exempting jurors for a greater or lesser period in view of exceptionally onerous service on the occasion of the granting of the exemption; but it seems that in practice the exemptions granted by a previous court are always respected by a court of equal or higher standing. The existence of some exempting power in judges seems to be recognised by section 3 of the Juries Act, 1922, but neither that section nor, as far as can be gathered, any other statutory provision, confers such a power.

The practice seems to extend far enough to excuse from service at Quarter Sessions jurors exempted by a judge at Assizes—see the remarks of Judge Lumley Smith in the City of London Court (*The Times,* July 26, 1910) where he also pointed out that it is the business of the juror claiming exemption to produce his certificate of exemption to the summoning officer. These certificates are issued to those exempted jurors who ask for them by the Clerk of the Assize.

No certificate is apparently issued in respect of exemption granted at Quarter Sessions, so that on a future occasion the exempted juror must rely on the collective memory of the court's officers. In any case such an exemption carries no weight at future Assizes. [D. W. E.]

### 13. *Procedure where police officer conducting case incapacitated*

I am interested in part of your reply to a correspondent in the case where a police officer was incapacitated (No. 7, [1956] Crim. L.R. 359).

You suggest that the officer's absence could be covered by production of a certificate under section 41 of the Criminal Justice Act, 1948, but would this not mean that the only evidence against the owner of the vehicle would be that he admitted ownership? Evidence given by the first officer would relate only to the driver or person in charge of the vehicle and would not be evidence against the owner. [R. N. M.]

ANSWER

The evidence of the first officer would presumably establish the defective condition of the vehicle and the fact that it was being used on a road, which are the other parts of the case requiring to be proved against the owner. [A. E. J.]

# *Letters to the Editor*

## Discretion in Prosecuting

Sir,

In Dr. Glanville Williams's article "Discretion in Prosecuting" [1956] Crim.L.R. 222, there is a statement at the bottom of p. 226 that the police in England cannot withdraw a prosecution, once it has been started, without leave of the court, when the case must be reported to the D.P.P. I am interested to know the authority for this statement in so far as it relates to reporting withdrawals to the D.P.P. I am particularly interested in knowing how far this relates to motoring offences, as often the police, having preferred a charge of dangerous driving, withdraw it prior to the hearing of evidence by the magistrates, substituting a charge of careless driving, having made a bargain with the defendant's solicitors whereby a plea of guilty is entered to the less serious charge. As this arrangement appears to be more for the convenience of the parties than in the interests of justice and does not give the magistrates an opportunity to adjudicate on the real merits of the case, it would be interesting to know what is the D.P.P.'s view about this.

Yours faithfully,
G. P. V. CREAGH,
Solicitor.

*Bury St. Edmunds.*

Dr. Glanville Williams writes: "Under the Prosecution of Offences Regulations, 1946 (S.I. No. 1467), reg. 6, 'the chief officer of every police district . . . shall, as respects offences alleged to have been committed within his police district, report to the Director of Public Prosecutions . . . (*c*) every indictable case in which the prosecution is wholly withdrawn or is not proceeded with within a reasonable time.' The rule is, however, confined to indictable offences. Dangerous driving may be dealt with either on indictment or as a summary offence (Road Traffic Act, 1930, s. 11) but under section 18 of the Magistrates' Courts Act, 1952, such offences are treated as indictable offences until the magistrates' court having jurisdiction to try the information summarily decides to do so. Therefore, it would appear that when a charge of dangerous driving is withdrawn prior to the hearing of evidence by magistrates the chief officer of police must report that offence to the Director of Public Prosecutions."

# Books and Periodicals

**Reviews :**

*Capital Punishment as a Deterrent: and the Alternative.* By Gerald Gardiner Q.C. London: Victor Gollancz, Ltd. 1956. 92 and (notes) 3 pp. (6s. net.)

*A Life for a Life?* The problem of capital punishment. By Sir Ernest Gowers. London: Chatto & Windus. 1956. 138 and (appendix) 6 pp. (7s. 6d. net.)

" The history of legal procedure is the history of the rejection of reasonable and civilised standards in the administration of law by most eminent judges and leading practitioners." This is an extract from the evidence of Mr. Justice Frankfurter before the Royal Commission on Capital Punishment, 1949–1953, and quoted by Mr. Gardiner (p. 55). There can be no doubt, therefore, respecting the appeal of a practising Q.C., who writes in favour of the abolition of capital punishment.

The title of the first book limits the consideration of the many arguments for and against the use of the death penalty. Being a lawyer, the author optimistically assumes that reason and emotion in respect of the case for the retention of capital punishment, though generally inextricably jumbled up, " are by their nature inherently separate " (p. 14). On this ground, no doubt, the voice of the people is placed amongst the minor arguments. The basic considerations, deterrence and the alternative are carefully examined; all available new evidence is adduced and improvements, for example in the prison system, to make the alternative more acceptable are supported with reference to facts and statements.

The reasons for reading this book are threefold: the obvious sincerity of the author, his position in professional life and his careful conclusion that " one requires some justification before deliberately killing people and that, while I dare say that there are a good many things to be said against capital punishment, the real point is that there is nothing whatever to be said for it " (p. 8).

*A Life for a Life* is an excellent exposition of the arguments for and against the death penalty in England in peace time. Since the problem of capital punishment has been fiercely discussed in most civilised countries for two centuries at least, very few new arguments are available. Perhaps the question on whom the burden of proof shall lie is the most recent: is it for those in favour of its retention to show its need or for the abolitionists to prove its relative uselessness? The deterrent effect of capital punishment is, as Sir Ernest points out, an inevitable factor to be considered. All unpleasant punishments are deterrent to a greater or lesser degree. The question is " the practical one whether, in this country at the present time, we need to maintain the death penalty as the only deterrent powerful enough to save us from being murdered in larger numbers than we are to-day " (p. 88).

The short section on retribution, in the sense of vengeance, is admirable. If it is accurate, as the Royal Commission Report stated, that modern penological thought discounts retribution in this sense, perhaps the most important element in the debate has been removed. It is clear, as Sir Ernest shows, that many responsible people, Lord

Justice Denning among them, do not subscribe to this view. "The force of the retributive element in moulding public opinion is probably obscured by a feeling that the deterrent element provides a more respectable argument" (p. 117). Professor Sellin, of the University of Pennsylvania, is quoted from the Royal Commission Report as supporting the conclusion that: "Hence it is often difficult to determine whether or not those who advance utilitarian arguments for or against the death penalty actually base their position fully on them or merely use them to hide irrational feelings which really motivate them but which they cannot expose" (p. 117). Sir Ernest concludes this chapter by observing that no one knows how widespread the popular demand for capital punishment is: "but it is certainly not negligible. Whether it is right or necessary for the State to encourage its satisfaction is another matter" (p. 118). What exactly this retributive quality does satisfy is an open question. Would abolition result in an increase in cruelty to animals or children, for example?

This book should be read by anyone who really wants to make up his mind on the question of abolition or retention. It would not help those who are convinced, but it might do much to make the large majority of persons form an opinion who, at present, avoid considering the problem. It is very carefully reasoned, the arguments put forward being based, for the most part, on the evidence and findings of the Select Committee on Capital Punishment, 1930, and the Royal Commission Report on Capital Punishment, 1949–1953 (Cmd. 8932). Opinions are avoided for the most part, but the author does conclude by saying: "I have little doubt that, in the last resort, it is emotion rather than sense that will decide the issue" (p. 138).

T. E. JAMES.

*Hypnosis.* Its Meaning and Practice. By Eric Cuddon, M.A., B.C.L., Barrister-at-Law. London: G. Bell & Sons, Ltd. 1955. viii and 167 and (appendix, bibliography and glossary) 8 pp. (10s. 6d. net.)

This book is an admirable introduction to hypnotism. It amply achieves the objects of the Series (to make available the records of the Society for Psychical Research), and of the author (to dispel illusions about the subject by giving a simple explanation). It describes clearly the induction and termination of hypnosis, the effects which can be achieved, post-hypnotic suggestion, the limits placed on the power of the hypnotist by the moral sense of the subject, its uses in medicine, and its history and theoretical basis. No unwarranted claims are made, for the book is distinguished by a detached, scientific, and even at times an exaggerated, caution in basing arguments on the experiments cited.

The author is at his best when describing his own experiences, and his failures are not less instructive than his successes. He wholly vindicates his thesis that this is not a sinister and mysterious power inherent in the hypnotist, but an art in which the operator's success is due to his use of a practical, shrewd, and observant psychology. Yet when he comes to hypnotism as a power over the subject—the aspect which gives the layman most cause to fear and suspect hypnotism—his scientific detachment suffers somewhat from a desire to maintain his thesis and to allay fears.

There are a number of points (especially in Chapter 5, dealing with the limits of hypnotic power) which will interest the lawyer, though the author, himself a barrister-at-law, deals with them rather sketchily. To what extent can the hypnotist procure the commission of a crime by a subject? The author takes the view held by many practitioners that a limit is set to the operator's powers by the moral values (in the widest sense) of the subject. This is doubtless true, but it is not wholly comforting, for there seems no reason why crimes cannot be procured, provided they are suggested in such a way as to harmonise with the subject's moral standards. The author seems to admit this reluctantly, as well as the fact that the commission of a crime against the subject is not impossible. There seems no recorded case in which the defence of hypnotism is raised to a criminal charge. *R.* v. *Charlson* [1955] Crim.L.R. 316, and *R.* v. *Harrison-Owen* [1951] 2 All E.R. 726, deal with automatism, but the author makes it clear that the subject is no mere automaton, and he takes the view that the defence of hypnotism would be successful as showing that no *mens rea* existed. Might there not be situations, however, in which no voluntary act at all was present, and the case equated with sleep-walking and automatism? Since there are many degrees of hypnosis, it might be a question of fact whether automatism had in fact been produced. Unfortunately, the author does not develop these interesting topics.

The Hypnotism Act, 1952, forbidding the use of hypnotism for entertainment purposes, is printed as an appendix to this excellent volume. It is worth noting that it affords another instance of a power to enter premises being given to the police if they have reasonable cause to believe that the Act is being, or may be, contravened.

C. A. MORRISON.

*Famous European Crimes.* By David Rowan. London: Frederick Muller, Ltd. 190 pp. (12s. 6d. net.)

The author of *Famous European Crimes* has summarised in this book eleven post-war Continental crimes, and has presented a fascinating volume. He tells us, in the Preface, that "crime, like apples or cheese, has a different flavour in every country; the seeds or ingredients may appear identical, but not the finished product." After reading this book, one is bound to agree that none of these crimes could have taken place in quite the same way in England. A large part of the fascination in reading these crimes lies in the events before the trial itself. There is, of course, particularly in France, a very much longer delay between the arrest of the accused and his trial than there is in this country. Sometimes the accused may remain in prison for three or four years while awaiting trial, and during this period there is very great freedom for the expression, through the newspapers, of public opinion. Thus, one may read that the newspapers were referring to Madame Chevallier (who shot her husband, a cabinet minister) as "the murderess" a long time before her case was heard. In fact, Madame Chevallier, relying on the defence of *crime passionnelle,* was acquitted to the tumultuous applause of 7,000 spectators gathered outside the court-house. Similarly, Marie Bernard was nicknamed "the Sorceress" by the newspapers before her trial, and the trial was adjourned before its completion and is unlikely to be reopened. Other cases which the author deals with are those of Dr. Petiot, the doctor who on his own admission murdered 63 people; the robbery of more than £200,000 in jewellery from the Begum Aga Khan; the disappearance of the Crown Jewels of Hesse-Darmstadt; the murder of a young medical student by his lover, Pauline Dubuisson; the remarkable story of Giuliano, the Sicilian bandit who for five years defied an army; and the murder of Sir Jack Drummond, his wife and their eleven-year-old daughter, a case which is still unfinished. The author of *Famous European Crimes* draws considerably on first-hand knowledge gained as a foreign correspondent to a newspaper and has provided a really first-class crime book.

HENRY PALMER.

**Reader's Digest:**

*Conspiracy*: Mr. G. H. L. Fridman concludes that a person may be guilty of conspiracy even though nobody is actually conspiring to commit an unlawful act with him: 19 *Modern Law Review* 276.

*McNaghten Rules*: Mr. A. E. Gotlieb considers the test of knowledge of the nature and quality of an act contained in the McNaghten Rules and compares it with the concept of intention: 19 *Modern Law Review* 270.

*Evidence—Onus of proof*: Should a jury be directed that guilt must be proved "beyond a reasonable doubt?" After examination of a number of cases it is submitted that they should in 106 *Law Journal* at pp. 292, 309.

*Magistrates' courts*: It is argued that a magistrates' court may set aside its own previous decision and retry a case where the first trial was a nullity or where it took place in the inadvertent absence of the defendant: 120 *Justice of the Peace* 275.

*Road Traffic—Driving*: What is the meaning of driving in the Road Traffic Acts? It is argued that it may have different meanings in different sections in 120 *Justice of the Peace* at p. 327.

*Road Traffic—Disqualification from driving*: Attention is drawn to the difficulties which may arise where an application is made to a magistrates' court as the convicting court for the removal of a disqualification from driving imposed by a quarter sessions appeals committee: 120 *Justice of the Peace* 294.

*Road Traffic—Police signal*: If a police signal is disobeyed unintentionally is any offence committed? This question is considered in 20 *Journal of Criminal Law* at p. 192.

*Poachers*: How poachers may be dealt with under the Protection of Birds Act, 1954, is illustrated in the *Police Review*, May 11, 1956, at p. 334.

*Highways*: The common law and statutes relating to obstruction are considered in some detail in 120 *Justice of the Peace* at pp. 258, 277, 295.

*Cruelty to children*: The results of a clinical examination of a number of persons sent to prison between October, 1953 and October, 1954, for cruelty to children involving violence are described in 6 *British Journal of Delinquency* at p. 260.

*Borstal training*: Mr. Rose considers further the relationships between the boys in a Borstal institution: 6 *British Journal of Delinquency* 285. See [1956] Crim.L.R. 368.

*Detection*: M. Chabot, Head of the Regional Criminal Police, Lille, describes how he has used composite photographs for identification purposes: *International Criminal Police Review*, April, 1956, p. 99.

THE
CRIMINAL LAW
REVIEW

*Editors*
JOHN BURKE and PETER ALLSOP, M.A.
*Barristers-at-Law*

# *Editorial*

## The police and gang warfare

The recurrence of the vicious crime of razor-slashing and the outbreak of gang warfare in London has caused some alarm. A number of people have called for strong measures and have criticised the inaction of the police, forgetting that they cannot at one and the same time have individual liberty, which is usually deemed so precious, and a police force able to imprison without hindrance. As the Home Secretary pointed out in the House of Commons [1] the police cannot round up people suspected of crime just as they would take stray dogs to Battersea. Is the Home Secretary to put people out of harm's way without charge or trial? The better method of dealing with such outbreaks of crime is to follow the usual course of the law. This prevents the loss of due respect for the law and is effective. On June 20, at the Central Criminal Court two men were each sentenced to seven years' imprisonment for an attack on one John Carter in which shillelaghs, knives, hammers and coshes were used. In passing sentence Donovan J. said: "I have not the least doubt that there are other and very wicked persons behind you, but the tools of those persons must realise that if discovery follows, punishment will be condign."

## Justices' discretion

In *R.* v. *Lower Miskin JJ., ex p. Thomas*, a case heard in the Divisional Court on June 7, 1956, Lord Goddard C.J. once again reminded justices of the principles which should guide them when exercising a discretion entrusted to them by Parliament. An application for certiorari was before the court to bring up and quash the decision of licensing justices who had refused to transfer a licence. Lord Goddard said that where Parliament has entrusted justices with a discretion, that discretion must be exercised judicially and not capriciously, they must take into consideration only the evidence given before them and must not allow personal prejudice to influence their decision. It was not a proper exercise of discretion for justices to say " No matter what the evidence is we will not do this." The court had laid down that it would interfere if the decision arrived at was clearly perverse, *i.e.*, if it was one which no fair man could come to on the evidence. If justices applied their minds to matters which might have been dealt with in the course of the hearing, but which were not dealt with at that time they were not acting judicially and if they had not acted judicially they had not acted in accordance with law.

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[1] H.C. Debates, Vol. 554, col. 1621; June 21, 1956.

### Police annual reports

It is to the credit of the Metropolitan Police that there was not more crime in London in 1955. In the Report of the Commissioner of Police of the Metropolis for the Year 1955 (Cmd. 9786) Sir John Nott-Bower points out the difficulties of his police force in dealing with their worst problems, those arising from prostitution in the West End. Moreover the force has declined in strength, there being 260 men less in it at the end of 1955. Road traffic problems occupy much of the time and energy of the police ; during the Christmas shopping period the Commissioner had to increase by some 50 per cent. the number of men normally employed on traffic duty.

The Report contains an interesting analysis of crime in the Metropolitan Police District during 1955. Offences against the person rose by 6·2 per cent. compared with 1954 ; offences against property rose by 1·3 per cent., but there was a drop in housebreaking and in robbery.

The Report of H.M.'s Inspector of Constabulary for Scotland for the Year 1955 (Cmd. 9771) shows an encouraging increase in number of policemen, but the shortage is still serious. The decrease in crime was not so great as in 1954. There has been a decrease in the number of cases solved. The theft and reset of metals gives considerable trouble, as does the theft from prepaid gas and electricity meters.

### Cause of death

A defence occasionally raised to a charge of murder or manslaughter is that the deceased would not have died if he had followed medical advice, but it has long been held that " a person who assaults another has no right to expect that the latter will receive medical treatment to repair the injuries inflicted by the assaulter." This rule was reaffirmed in *R.* v. *Mubila,* 1956 (1) S.A. 31. The deceased was badly wounded by the accused and was admitted to hospital. Disobeying medical advice, he got out of bed. He suffered a haemorrhage and died. The accused was found guilty of culpable homicide. The authority of the case is weakened, however, by the fact that in the circumstances it seems probable that the deceased would have died, even if he had obeyed his doctors.

### Advocacy at petty sessions

The articles by Mr. Fraser Harrison published in the *Criminal Law Review* in 1955 under the title " Advocacy at Petty Sessions " have now been revised and published as a book. A new chapter on evidence has been added.

### Parliament

#### *Crown privilege*

The Lord Chancellor made a statement concerning claims of Crown privilege. The Government propose that if medical documents or other documents are relevant to the defence in criminal proceedings, Government privilege should not be claimed. At present many of these documents are only available in the case of the more serious crimes such as murder, manslaughter and rape. Crown privilege will not be claimed for statements made to the police, the only exception being statements by informers, *i.e.*, by persons volunteering information about the commission of crimes. Crown privilege in respect of documents the disclosure of which would injure the public interest is unaffected, and the Government propose that reports and records of prison doctors, who owe a special duty to the prison governor, should still be privileged in proceedings between private litigants (H.L. Debates, Vol. 197, cols. 741 *et seq*., 745).

#### *Betting*

Replying to a debate in the Lords, Lord Mancroft gave further details of the Government's proposal to introduce legislation dealing with betting and gambling. Such legislation has proved more complicated than was at first thought and difficulties of drafting previously suspected have now become apparent. The legislation will however be based on the following general principles. Licensed betting offices will be established and there will have to be a comprehensive system of control involving the registration of bookmakers and the legalising of off-course cash betting by post. There will be sterner penalties against receiving cash bets off the course in any other way than by post or at licensed betting offices. There will also be certain controls in respect of children and young persons. As to gambling the Government will try to bring the law into line with present practice and opinion. Those forms of gambling which are at present tolerated will be legalised and the conduct of commercially organised gambling will be prohibited. It is not possible for the Government to say when the Bill will be introduced (Vol. 198, cols. 97 *et seq.*; June 27, 1956).

### *Children and young persons*

The chairman of the Departmental Committee which is to inquire into the law relating to children and young persons is the Rt. Hon. Viscount Ingleby. The Committee's terms of reference are to inquire into and make recommendations on (a) the working of the law in England and Wales relating to (i) proceedings and the powers of the courts in respect of juveniles brought before the courts as delinquents or as being in need of care or protection or beyond control; (ii) constitution, jurisdiction and procedure of juvenile courts; (iii) the remand home, approved school, and approved probation home systems; (iv) the prevention of cruelty to, and exposure to moral and physical danger of, juveniles; and (b) whether local authorities responsible for child care under the Children Act, 1948, in England and Wales should, taking into account action by voluntary organisations and the responsibilities of existing statutory services, be given new powers and duties to prevent or forestall the suffering of children through neglect in their own homes (H.C. Debates, Vol. 554, col. 1618; June 21, 1956).

### *Police*

The efficient use of police forces was debated in the Commons. Replying to the debate, Mr. W. F. Deedes said that there was no more effective way of encouraging the wider adoption of new ideas and methods than by publicising experiments which are being carried out. On April 30 the strength of the police forces in England and Wales was 66,708, the highest figure so far achieved. Inspectors of Constabulary are considering again the extraneous duties of the police. As a result of experiments a wireless set has been produced suitable for use on motor-cycles; arrangements have been made for a month's free trial of such a wireless set where this is required by a police force. Summing up Mr. Deedes said that, however much modern methods are resorted to, the quality of the police force will ultimately depend on the quality of the persons attracted to its ranks (Vol. 553, cols. 1578 *et seq.*; June 8, 1956).

The Road Traffic Bill will create a small number of offences, adding to the enforcement duties of the police, but it is designed to ease the task of the police in controlling road traffic. There is no reason, therefore, for an increase in police establishments (Vol. 554, col. 1620; June 21, 1956).

### *Dangerous weapons*

Up to December 31, 1955, 244 persons were prosecuted in the Metropolitan Police District for offences under the Prevention of Crime Act, 1953. Of these 203 were summarily convicted and in fifteen cases the charges were withdrawn, dismissed or otherwise disposed of. The remaining twenty-six persons were committed for trial (Vol. 555, col. *66*; June 28, 1956).

### *Road traffic*

The Home Secretary refuses to introduce legislation enabling magistrates' courts, even when sitting as examining justices, to disqualify automatically persons brought before them on charges of dangerous driving whilst under the influence of drink, pending their trial by a higher court (Vol. 555, col. *11*; June 25, 1956).

*Subscribers and others are invited to submit for publication articles and letters on matters of interest within the scope of this Review. They should be sent to the* EDITOR, *Criminal Law Review*, 3 CHANCERY LANE, LONDON, W.C.2. *Every effort will be made to return drafts or unsuitable copy but no guarantee can be given in this respect.*

*Books for review should be sent to the Publishers at the above address.*

# Larceny by Finding Out

By J. C. SMITH, M.A., LL.B., *Barrister-at-Law*

### Moynes v. Coopper

For centuries the law of larceny has been the source of a struggle between the principle of legality—*i.e.*, that no man shall be punished except for an act that is expressly declared to be a crime by the law—on the one hand and, on the other, the natural desire of the judges that a man who has acted in a patently dishonest manner should not escape punishment. The definition of the crime in the early stages of its history was very narrow and excluded many dishonest acts that are now within the scope of the Larceny Act. This extension of the criminal law has been due partly to the defeats suffered in the courts by the principle of legality and partly to statutory reforms. It remains true today, however, that the definition of larceny and cognate crimes is not so wide that clashes with the principle of legality may not occur and there is one limitation upon the scope of larceny which is particularly productive of such conflicts. It is the rule (commonly known as the " rule in *Thurborn* " (1849) 1 Den. 387 and now contained in s. 1 of the Larceny Act, 1916) that the *animus furandi* must be formed *at the time of taking,* so that an innocent taking followed by a fraudulent appropriation is no larceny. There seems to be no reason why one who decides to be dishonest after getting his hands on a chattel is less deserving of punishment than one who so decides before or at the time of doing so. There are, moreover, a number of exceptions to the rule. The servant who has innocent custody of his master's goods or who innocently receives goods from a stranger for his master, the bailee who takes goods from his bailor in good faith, all are guilty of felony if they subsequently misappropriate the property. But, subject to these cases, the general rule survives and its survival has produced once again the familiar conflict in the decision of the Divisional Court in *Moynes* v. *Coopper* [1956] Crim.L.R. 268; [1956] 1 Q.B. 439.

The facts were that the defendant, Moynes, on April 29, 1955, received from his employers an advance on his week's wages of £6 19s. 6½d. The employers' wages clerk was not informed of the advance and, on May 2, handed to Moynes a packet containing the full amount of his week's wages, £7 3s. 4d., instead of 3s. 9½d.

which was all that he was entitled to. When he received the packet Moynes did not know that it contained more than was due to him. He found this out later in the day when he opened the packet at his home. He then realised that he had been paid £6 19s. 6½d. twice by mistake, and dishonestly appropriated that sum to his own use. Moynes was convicted by the justices of larceny of £6 19s. 6½d. contrary to section 2 of the Larceny Act, 1916, but his conviction was quashed by the West Kent Appeal Committee. The prosecution's appeal by way of case stated to the Divisional Court (Lord Goddard C.J., Hilbery and Stable JJ.) was dismissed, Stable J. dissenting.

The appeal committee considered that the case was indistinguishable from *Prince* (1868) L.R. 1 C.C.R. 150, where it was held that one who receives money on a forged cheque from the cashier of a bank who has authority to pay cheques is not guilty of larceny of the money. The well-known case of *Middleton* (1873) L.R. 2 C.C.R. 38, on the other hand, was distinguished. There a majority of eleven judges to four held that where a post office clerk refers to the wrong letter of advice and hands to a depositor a sum greater than that to which he is entitled, the depositor is guilty of larceny if he takes the money knowing of the clerk's mistake. Mr. Thesiger Q.C., delivering the judgment of the committee, pointed out that some of the judges in *Middleton* (in fact three of them) "decided that the conviction could be sustained upon the ground that the clerk in the post office had no authority from the Postmaster General, who was the true owner of the money, to hand over £8 but only to hand over the 10s.[1] That point," he said, "does not arise in this case, where no point is raised as to the authority of Buchanan, the wages clerk, to pay what he thought was due to the labourers." Seven of the judges, in his view, based their judgment on the ground that there was a mistake as to the *identity* of either the depositor or the deposit.[2] He concluded:—

> "That case, therefore, on close analysis, does not assist the prosecution in this case, where there is no mistake as to the identity of the person to whom the money was to be handed and no mistake as to the identity of the sum that was handed to him."

Nor was the prosecution assisted by the provision in the

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[1] The quotations from the judgment of the appeal committee are from the transcript from the shorthand notes of Harry Counsell & Co., The Gateway, New Court, Carey Street, London, W.C.2, official shorthand writers to the court.

[2] The learned editor of Russell on *Crime*, 10th ed., takes a contrary view: Vol. II, p. 1148.

Larceny Act, s. 1 (2) (i) (*c*), which is commonly supposed to be designed so as to embody the result of *Middleton*: "The expression 'takes' includes obtaining the possession . . . under a mistake on the part of the owner with knowledge on the part of the taker that possession has been so obtained." These words could not be interpreted to extend the expression "takes" to a case where a person is given the ownership as well as the possession of a thing by the authorised agent of the owner.[3] Furthermore, the "taking," however defined, must be without the consent of the owner. As Mr. Thesiger put it:—

> "The dominating words of the definition of larceny which are not dealt with by subsection (2) of section 1 of the Larceny Act are that a person steals who 'without the consent of the owner' does what is afterwards set out. In this case . . . it is clearly a case where the money was carried away from the wages table with the consent of the duly authorised agent of the owner and, indeed, with the consent of the owner having regard to the definition of that expression in this section 1 of the Larceny Act, where it was said: 'the expression "owner" includes any . . . person having possession or control of . . . anything capable of being stolen.'"[4]

The *ratio decidendi* of the appeal committee is that there was no larceny (a) because Moynes received the ownership in the money and (b) because he took the money with the consent of the owner. This decision would then have been the same even if Moynes had formed the *animus furandi* at the moment of receiving the money. Indeed, it was only after the court had given judgment quashing the conviction and prosecuting counsel had asked the court to state a case that the court found as a fact that the *animus* was formed, not at the wages table, but later at the accused's home.

This belated finding of fact was, however, the basis of the decision of the majority in the Divisional Court. Without dissenting from the view taken by the appeal committee they distinguished *Middleton* on the different ground that in that case the prisoner knew of the clerk's mistake when he picked up the money and so he took it *animo furandi*: " In the present case it is found that the defendant did not know of the mistake when he took the money, so the taking was not *animo furandi*. We prefer to base our decision on this ground, namely, that there was no taking here within the section " ([1956] 1 Q.B. 439, 445). In basing its decision on these grounds the court was obliged to distinguish the famous case of *Ashwell* (1885) 16 Q.B.D. 190 and its direct descendant, *Hudson* [1943] K.B. 458. Both these cases turned on the question of the time at which the taking occurred, and it is now necessary to examine the peculiar doctrine of " taking by finding out " for which they stand.

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[3] This, it is respectfully submitted, is the right answer to the argument advanced in Kenny, *Outlines of Criminal Law*, 16th ed., 225, and Russell, *op. cit.*, 1152, that if s. 1 (2) (i) (*c*) be taken to embody the result of *Middleton*, all cases of false pretences under s. 32 will also become felony under s. 1. *Middleton* depends on the finding that the ownership did not pass and consequently s. 1 (2) (i) (*c*) should be limited to such cases. This necessarily excludes all cases of obtaining by false pretences.

[4] The insertion of the wide statutory definition of "owner" into the phrase "without the consent of the owner" would cause great difficulties. *E.g.*, if a fraudulent servant allowed an accomplice to take his master's property from his custody, the accomplice, on being indicted for larceny from the master, could plead that he had the consent of the "owner"—*i.e.*, the servant. This can hardly be the law. Is not the answer that, in every indictment for larceny, there is only one person who is the owner, and that is he in whom the property is laid?

### *The " taking " in Ashwell and Hudson*

Ashwell asked the prosecutor, Keogh, if he would lend him a shilling; Keogh put his hand in his pocket and produced a coin which he gave to Ashwell. It was dark and both of them believed the coin to be a shilling but in fact it was a sovereign. Within an hour Ashwell discovered the error and then fraudulently converted the sovereign to his own use. He was convicted before Denman J. and on a case reserved, the fourteen judges being equally divided, the conviction stood. The view of the affirming judges was that the taking was not innocent because—to quote Lord Coleridge C.J. (1885) 16 Q.B.D. at 225—" he did not take it till he knew what he had got; and when he knew what he had got, that same instant he stole it." [5] James Hudson received from the Ministry of Food a letter containing a cheque that was intended for a neighbour, Lewis Hutson. After innocently retaining the letter for a period which may have been as long as some days he opened it, discovered the cheque and at once decided to steal it. It was held by the Court of Criminal Appeal, following *Ashwell* and, in particular, the dictum quoted above, that he was guilty of larceny.

The doctrine that the accused in such a case does not take because he does not possess until he knows the nature of the thing which he has was considered in detail and rejected by a majority of five to four of the Irish Court for Crown Cases Reserved in the valuable case of *Hehir* [1895] 2 I.R. 709, where the material facts were the same as in *Ashwell*. O'Brien J. there summed up the attitude of the minority, at p. 747, as follows:—

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[5] In the case of *Flowers* (1886) 16 Q.B.D. 643 the facts were very similar to those of *Moynes* v. *Coopper*, but the case is not a useful authority as the recorder's direction—that the taking and *animus furandi* need not be contemporaneous—was obviously wrong, and the conviction was quashed on that ground.

> "[The prisoner] is not a bailee. He is not a finder. We must invent a new category. He is a finder out. In other words he commits a crime by the operation of his mind."

The decisions in *Ashwell* and *Hudson* depend on the notion that, until the accused knew the nature of the chattel in question, he did not have possession of it and therefore did not "take" it. Since he obviously had physical control of the thing this result was necessarily attributed to the absence of some mental element essential to possession. Several points call for comment:

1. Some passages in the judgments seem to assume that the intentions of both giver and receiver are important in this connection. Thus Lord Coleridge said ((1885) 16 Q.B.D. at 224): "Delivery and receipt are acts into which mental intention enters, and . . . there is not in law any more than in sense a delivery and receipt, unless the giver and receiver intend to give and to receive respectively what is respectively given and received." Now the questions (i) Did the owner intend to part with possession? and (ii) Did the taker get possession? are quite independent. The thief usually gets possession *against* the consent of the owner. Where a master entrusts goods to his servant in his capacity as such the servant has merely custody and not possession, so long as he intends to hold as servant. But once he evinces an intention to hold on his own account he acquires possession. It is the intention of the servant, not that of the master, which is relevant. The only intention that was relevant to the acquisition of possession in these cases was therefore that of the taker,[6] and this was recognised by Lord Coleridge when he said: "When he knew what he had got, that same instant he stole it." Furthermore, if the owner did not consent to the taker's having possession at the start, he certainly did not do so later, so it is implicit in the *rationes decidendi* that it is the taker's intention only which matters. When we are concerned with the entirely different question of the *ownership*, the giver's intention is, of course, vital.

2. The convicting judges in *Ashwell* and *Hehir* assumed that the mistake the parties made was one of *identity*, whereas the acquitting judges thought that it was merely one of attribute. Madden J., who was for convicting in *Hehir*, made it clear that, if he had thought the mistake one of attribute only, he would have acquitted. This must surely be right, for in that event the ownership in the

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[6] The giver's intention is, of course, relevant to a quite different question, namely, Was the taking effected with the consent of the owner?

chattel would presumably have passed. If it was the giver's mistake which prevented ownership from passing, it was nevertheless, in the view of the court, clearly the mistake of the receiver which prevented him from having possession. For it was when the receiver's mistake was rectified that he got possession.

3. The decisions that Ashwell and Hudson did not get possession until " they knew what they had got " are difficult to reconcile with the authorities on possession [7] and have been severely and, it is submitted, rightly criticised; but *Hudson* at least was binding on the court in *Moynes* v. *Coopper*, so criticism of those cases is outside the scope of this article. It is, on the other hand, necessary to consider how the Divisional Court reconciled its decision with *Hudson*.

### *The distinguishing of Hudson*

The decision of the Divisional Court is based on the assumption that Moynes *took* the £6 19s. 6½d. when he got the pay packet into his hand. But how can this be reconciled with the doctrine of *Ashwell* and *Hudson* that there was no taking " until he knew what he had got "? Moynes did not know that he had got the £6 19s. 6½d. until he opened his pay packet and then, if the view of Lord Coleridge be applied, " when he knew what he had got, that same instant he stole it."

The distinction taken by the Divisional Court was ([1956] 1 Q.B. at 446): " In *Hudson's* case neither the cheque nor the envelope was intended by the sender for the accused. Here there is no doubt that the pay packet was intended for the defendant and was so delivered to him." While this is true, its relevance is not readily apparent. Two difficulties appear: —

1. Moynes was charged with stealing the *money*, not the packet in which it was contained. The implication in the judgment is that the intention to deliver the packet affected the deliveree's position with respect to its contents. This causes difficulty with *Cartwright* v. *Green* (1802) 8 Ves. 405 and *Merry* v. *Green* (1841) 7 M. & W. 623, which must be considered to have some authority as they were strongly relied on by the affirming judges in *Ashwell*, especially in the passage of Cave J.'s judgment which was followed in *Hudson*. Both cases concerned the delivery of a bureau containing, unknown to either party, a sum of money which the deliveree, after being in possession of the bureau for some time, discovered and took,

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[7] *e.g., Reed* (1854) Dears. 257; *Rowe* (1859) Bell 93; *Hibbert* v. *McKiernan* [1948] 2 K.B. 142; *Elwes* v. *Brigg Gas Co.* (1886) 33 Ch.D. 562; *South Staffs Water Co.* v. *Sharman* [1896] 2 Q.B. 44.

*animo furandi*. It was held that this constituted larceny. According, then, to the line of cases, the latest of which the court was trying to distinguish, an intention to deliver the *container* does not prevent a fraudulent appropriation of its contents from being larceny. The distinction taken does not reconcile the case with *Merry* v. *Green*, from which *Hudson* is directly descended.

2. It has been emphasised above that, despite some misleading passages in *Ashwell* and *Hudson*, the question whether the accused in those cases got possession depended purely on the intention of the receiver and in no way on that of the giver. The Divisional Court was concerned with the question of taking, *i.e.*, acquisition of possession, and not with ownership. The intention of the giver was therefore irrelevant, and yet it was regarded as the vital distinction between this case and *Hudson*.

*The dissent of Stable J.*

It would be improper to conclude without considering the vigorous judgment of Stable J. Being obliged to distinguish *Prince*, he said ([1956] 1 Q.B. at 447):—

> " . . . there can be no doubt that if in the present case the defendant had obtained his pay packet by falsely and fraudulently telling the wages clerk that he had not received any advance on account of wages, but was entitled to be paid the full amount, [*Prince*] is a clear authority that he should have been indicted for false pretences, and if indicted for larceny could not properly have been convicted . . . *Prince* . . . is not in my judgment decisive of the present case."

That is to say: if he had made a fraudulent statement, he would merely have committed a misdemeanour; as he did not, he committed a felony! There is a still greater difficulty in the passage: false pretences is only committed where the ownership passes; it can hardly be said that the ownership would have passed if Moynes had made a fraudulent representation but not if he did not; yet if the ownership passed, the crime could not have been larceny.

Stable J. relied on *Middleton*, where one of the grounds of the decision was that the clerk had no authority to dispose of the money. He said ([1955] 1 Q.B. at 448):—

> " . . . the wages clerk in the present case was, in my judgment, in an identical situation; he was not the owner of the money and his only authority was to pay over the correct amount of wages, no more and no less."

In the first place this is inconsistent with the previous statement that if Moynes had made a false representation he could have been convicted of false pretences. If the clerk had no authority to pass the ownership the crime was larceny, even if there was a false pretence: *Stewart* (1845) 1 Cox 174. Secondly, whether there is authority or not is a question of fact (Powell, *Law of Agency*, 35) and the appeal committee had held that there was. Thirdly, as a matter of principle it is difficult to see why the clerk's authority to pay Moynes the full amount of his wages should be revoked by the fact that the employers *would have* revoked it if they had remembered to do so. This attempt to distinguish *Prince*, with respect, is not very convincing.

Stable J. then had to overcome the rule in *Thurborn*. He gave two reasons for holding the delay in the formation of the *animus furandi* to be immaterial. First, " the *animus furandi* was contemporaneous with the taking " ([1956] 1 Q.B. at 448). This conclusion was reached by relying on a passage of the judgment of Stephen J. in *Ashwell* (1885) 16 Q.B.D. at 216 which was also cited in *Hudson*:—

> " If a man finds a purse, picks it up, opens it, finds money in it, and thereupon determines to keep it for himself, it appears to me that the whole process ought to be regarded as one action, taking place at one time, as for many purposes the fractional parts of a day are not regarded by the law."

It has been pointed out by Mr. Kerr (66 L.Q.R. 174, 201) that the court in *Hudson* applied this extract " in the exact opposite sense to the one plainly intended by Stephen J." If Moynes had opened his pay packet at the wages table and thereupon decided to appropriate the money, that would doubtless have constituted the situation envisaged by Stephen J. The few seconds that would necessarily elapse between his getting the packet in his hands and his finding the money would be ignored. As Mr. Kerr points out, " This exceptional example Stephen J. categorically refused to apply to the facts in *R.* v. *Ashwell*; *i.e.*, he refused similarly to ignore the hour of innocent possession enjoyed by the prisoner in that case, and therefore decided in favour of an acquittal." Mr. Kerr's criticism applies equally to the use made of the extract by Stable J.

Secondly, said Stable J. ([1956] 1 Q.B. at 448, 450), even if it were wrong to regard the whole process as one transaction, " the time lag between his first getting possession of the pay packet and the *animus furandi* is immaterial . . . there cannot be a taking within the section unless the taker knows what he is taking or at least whether what he is taking belongs to him or not." This is simply the doctrine of *Ashwell* and *Hudson*, and, it is respectfully submitted, Stable J. was perfectly justified in following it.

*Conclusions*

It is respectfully submitted that:—

1. The *ratio decidendi* of the appeal committee that Moynes was not guilty because he became owner of the money and took it with the owner's consent is correct.

2. The decision of the Divisional Court is unsatisfactory in that it distinguishes the cases of "larceny by finding out" on the nature of the intention of the giver, a matter which is irrelevant to the point at issue.

3. Stable J.'s dissenting judgment is correct in assuming this to be a "taking by finding out" within the rule in *Hudson*; but unconvincing in its rejection of the *ratio* of the appeal committee.

The latest round in the struggle referred to at the beginning of this article has been won by the principle of legality, but only at the price of further confusing the already confused doctrine of "larceny by finding out." That doctrine should be made unnecessary by a new statutory definition of larceny in which the rule in *Thurborn* would have no place.

# Aspects of Forensic Science

By J. B. FIRTH, C.B.E., D.SC., F.R.I.C., M.I.CHEM.E.

*Director of the North-Western Forensic*
*Science Laboratory, Preston*

## Scenes of Crime

The scene of a crime is frequently a most fruitful source of information. It often provides the experts with valuable clues, concerning not only the commission of the crime but also the identity of the criminal. The first officer on the scene must take immediate steps to isolate and preserve the scene intact, to see that nothing is touched or disturbed until the arrival of criminal investigation officers and scientific experts. If an officer fails to do this then valuable clues may be lost.

In these days, in cases of major crime such as murder, the police can call for the assistance of experienced forensic scientists and pathologists, who can best give their help if they visit the undisturbed scene as soon as possible.

Experienced police officers will see that photographs are taken both of the scene as discovered together with close-ups of such details as may be of some particular significance. Often sketches with relative measurements are of value so that if necessary, accurate plans can be made. The modern police force often includes men skilled in this type of work. Good photographs provide a permanent record of the scene, and are of value to judge, jury and counsel. They also serve to refresh the memory of witnesses who may be required to describe important features of the scene perhaps several weeks after the incident.

An important point to be borne in mind in the investigation of a major crime such as murder is that both the victim and the criminal are closely associated with the scene of discovery, and therefore material from the scene likely to have been acquired by the criminal on his clothing must be carefully considered. It is, therefore, essential that police officers investigating an incident shall be skilled in assessing the value of material as " clues " likely to be of importance in the identification of the criminal.

Where police officers less experienced in criminal investigations are first on the scene, such as uniformed police and police patrols, it is imperative that the scene should be preserved intact as found until the arrival of the C.I.D. officers. In addition, material clues, including footprints, should be protected.

When a victim is discovered by civilians the scene may be seriously altered by them ; thus, in one case the body had been moved, clothing altered, and artificial respiration attempted before the police arrived. In another case, indoors, the scene indicated that the deceased had been drinking with another person ; the discoverer and local pathologists handled the glasses on the table, so putting their own fingerprints on the glasses. In yet another case where the victim had received serious head injuries the body had been moved and the dispersal of blood modified before the arrival of the police.

Bloodstains at the scene of a crime can be of considerable importance, for example, the dispersal of blood on the clothing may give some indication as to whether the victim was upright at the time of the attack and moved about ; in such a case blood will be found on the outer clothing and at the scene of the crime but some distance from the final position of the body ; on the other hand, if the person was on the ground or attacked while sleeping, bloodstains would tend to stain clothing (usually in the region of the neck and back) and there would be only limited dispersal of stains at the scene. Again trails of blood from the scene and a subsequent examination of blood samples from the scene may indicate whether the assailant had himself been injured (see *Forensic Medicine*, by Smith, 10th ed., p. 218).

"*The Blockhouse Murder*"—*R.* v. *Morgan* (1941)

A young girl failed to return home and was reported missing. A search was made and eventually her body was found by a group of searchers (not police). The scene was changed by many footprints of the search party; the body was also interfered with by searchers who, not realising that the girl was dead, removed the gloves and made some attempts at revival. Once the police arrived all activities were stopped pending the arrival of the C.I.D., forensic scientist and pathologists.

The incident occurred on a cold, wet night in November and the floor of the blockhouse was covered with a layer of mud. After a series of flash photographs had been taken, a preliminary examination of the body indicated that the girl had been dead for several hours and the body was then removed to the mortuary.

The blockhouse was then searched (by the aid of storm lamps) and material collected and taken away for laboratory examination. The post mortem revealed death from manual strangulation and impressions on the neck were associated with a raised pattern in *hard* dried blood, which suggested that her assailant had an injured thumb.

Much of the material removed from the scene gave no clues as to the girl's assailant but there was a mass of mud associated with fabric, and when the mud had been removed there was revealed what appeared to be a thumb bandage; this was found to be made from portions of a military field dressing (khaki strip and acriflavine-impregnated gauze). Thus a soldier became suspect. Inquiries revealed that other girls in the district had been accosted by a soldier, and also that a soldier, known to have stayed with relatives in the district, was wanted by the military authorities as a deserter.

A description of the deserter was circulated and he was subsequently picked up in London, brought up north and "paraded" with other soldiers in connection with other offences against women. He was picked out by one of the aggrieved women. It was noticed that this soldier had an injured thumb. He was detained and the police visited his sister's house where he was known to have stayed when on leave.

In the meantime, examination of the gauze from the blockhouse indicated the presence of zinc ointment. Police inquiries at the house revealed that a relative had dressed his injured thumb using a portion of his field dressing together with a little zinc ointment. The remaining portion of the gauze was kept and used as a face-cloth for a young child; this piece was recovered by the police.

There were certain flaws in the gauze from the blockhouse which also occurred in the gauze from the house. With the assistance of the Textile Testing Department of the Manchester Chamber of Commerce it was established that the gauze of the bandage from the blockhouse came from the same piece as that which was recovered from the relatives. Hence it was established that the bandage found in the blockhouse originated from the suspect. This evidence was a substantial contribution in establishing his guilt.

*A bomb-site case—R.* v. *Rowlands* (1946)

On October 20, 1946, the fully clothed body of a woman was discovered on a bombed site ; she had severe head injuries on the right-hand side.

The scene was carefully preserved and neither the body nor the environment were disturbed until a series of photographs and details of the scene, as found, had been recorded.

The body lying on the left side and the injuries of the dead woman indicated a concentrated series of blows in the region of the right eye. The dispersal of the blood on the face, *as found*, would indicate that the majority of the blows (if not all) in the region of the right eye were delivered when she was on the ground —the blood flows were *across* the face ; no bloodstains were found on the throat or front part of the neck. Preliminary examination, prior to removal from the scene, revealed no blood splashes *on the front* of the woman's clothing, and blood at the scene was limited to the region of the head and was essentially drainage from the wounds.

If at the scene the body had been disturbed, or carelessly handled before examination, the dispersal of the blood might have been seriously altered and certain evidence of value lost.

As already mentioned, the scene was a bombed site and on it were the ruins of the buildings and residues from the resulting fire ; since the bombing some of the scene had become overgrown.

A comprehensive collection of material from the scene included bricks and brick dust, cement, charcoal, clinker and vegetation—which included willow herb and coltsfoot.

A weapon found at the scene was a *short-shafted* shoe maker's hammer ; with such a weapon it would not be reasonably possible for the assailant to deliver standing up such a concentrated series of blows as appeared to have been delivered in this case ; it would be necessary for him to crouch or kneel in a position in which he could hardly avoid getting some of the material from the scene on to his clothes.

About five days after the incident, after extensive police inquiries, Rowlands was arrested, and the whole of his clothing was sent for laboratory examination. The suit was a relatively recent "demob. suit." In addition to a hair on the coat which agreed with that of the deceased, the material in the turnups of the trousers contained an appreciable amount of material common to the scene, and only a comparatively small amount of the normal "fluff." The material thus recovered contained brick dust, cement, charcoal, clinker and withered leaf tissue; this leaf tissue agreed in characteristics with leaf tissue from the scene (*e.g.*, willow herb).

The inside vertical edge of the heel of the left shoe was stained with human blood [1] but no other evidence of blood was found on the clothing of the accused.

At this time an organised system of pathologists experienced in forensic work, attached to the laboratories, was not in existence, and the post mortem was carried out on coroner's instructions by a local hospital pathologist at the mortuary. He did not visit the scene and his report was essentially the normal coroner's type, giving the cause of death as "fracture of skull," which "was not due to natural causes."

In cross-examination by counsel for the defence the pathologist was asked whether the injuries would spurt blood; the pathologist admitted that he had not considered that point, but when asked to consider the injuries, assisted by reference to photographs, he expressed the opinion that the injuries would spurt blood and further agreed that he would expect the assailant to have blood on his clothing.

In view of these opinions it was essential to stress that, not only was there no blood on the accused's clothing, but there was no evidence of blood splashes on the front of the dead woman's clothing, also no evidence of blood splashes at the scene beyond the immediate region of the head of the deceased.

The result of the trial was that Rowlands was found "Guilty" —there was an appeal to the Court of Criminal Appeal which was dismissed.

Then followed a confession by a prisoner, Ware, in which he described the incident between himself and the deceased which led to her death. He had apparently read in the press the suggestion that the injuries would spurt blood and in his description of the attack the injuries resulted in the spurting of blood into his face and onto his clothing. His clothing was submitted to the laboratory. A tiny blood spot and blood smear was found on the mackintosh and a faint bloodstain on the waistcoat. In the trouser turnups there was an appreciable amount of material. This was essentially the usual type of "fibre fluff" commonly found in trouser turnups, and the quantity indicated that the trousers had not been brushed for some considerable time. Other material included grass fragments, grass seeds, a little tobacco dust and sawdust (more than one type of wood).

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[1] It is highly probable that originally much of the flat of the heel would also be stained, but in the interval between the incident and the arrest—five days—the blood "on the flat" had worn off.

In general no material was found which would serve to identify the wearer with the site where the body was found.

At an inquiry into this confession, Ware eventually withdrew his confession and admitted it was false.

The foregoing examples illustrate the necessity for care to be exercised in the preservation of the scene of the crime until experienced officers and forensic scientists arrive; for care to be exercised in noting accurately the conditions as found and for care in the removal of a clothed body from the scene to the mortuary. Finally the post mortem should be carried out by a pathologist with wide forensic experience.

# The Criminal Law and the Woman Seducer

By A. N. MACKESY, LL.B.

(*Continued from p.* 456)

## IV. The Meaning of "Indecent Assault"

Indecent assault is a statutory crime, but "no definition of indecent assault is to be found," said Gardiner J. in *Abrahams* [1918] C.P.D. 590, 593, ". . . so far as I know, in any . . . statute which mentions the offence," and until 1951 there was no English criminal case in the law reports in which this question had been considered. As long ago as 1867, however, an Australian appellate court held that "indecent assault is nothing more than a common assault with circumstances of indecency on the part of the offender" (*Messenger*, 4 W.W. & A'B. (L.) 253). Kenny posed the question: "Is an indecent *act* essential to this offence, or does it suffice that an assault, decent in itself, was committed with an indecent *aim*?" (*Outlines of Criminal Law*, 16th ed., p. 154, n. 8); but a distinction cannot always be drawn between an indecent act and an act "decent in itself" without reference to the mental state of the actor. A prima facie indecent act is not indecent if it is committed by a medical man for medical purposes; on the other hand a non-indecent motive will not prevent a prima facie indecent act from being indecent: in the New Zealand case *Pearson* (1908) 11 Gaz.L.R. 139, where the accused took money to procure a miscarriage, made a pretence of doing what he had undertaken to do and then refused to do anything further, Denniston J. said: "An assault accompanied by indecent acts is not . . . the less an indecent assault because the inducement was money and not lewdness." See also *Armstrong* (1885) 49 J.P. 745. It is submitted that the criterion for deciding whether a prima facie indecent act is in fact indecent is whether the accused had, or thought he had, just cause for doing it.

The difficulty of distinguishing an act "decent in itself" from an act "in itself indecent" is illustrated by the difference of judicial opinion in cases on forcible kissing. In the English case *Baker*, heard in 1875, the jury was directed that "If a man assaults a woman in such a way that ordinary right-minded men would say it was indecent, that is an indecent assault. . . . If a man kisses a woman against her will for the purpose of gratifying a carnal feeling in his own mind or to excite a carnal feeling in hers, it is for you to say whether it is not an indecent assault. So that, if you are satisfied the defendant kissed her with such feelings . . . there would be an indecent assault" (16 *Journal of Criminal Law*, 89). For an extract from Brett J.'s direction to the Grand Jury in this case, see Kenny, *Outlines of Criminal Law*, 16th ed., p. 154, n. 8). A Transvaal court seems to have come to a similar conclusion in *Horak* (1916), unreported. *Horak* was considered in *Abrahams* [1918] C.P.D. 590, where Gardiner J. said (p. 594): "If the Transvaal judges meant to hold that a lewd motive could make kissing, unaccompanied by any indecent handling of the woman, an indecent assault, I am bound to say, with all respect to them, that I do not agree with them"; but Searle J. (in his dissenting judgment in *Abrahams*) thought (p. 597) that in *Horak* "it may well be argued that the physical act of kissing under the circumstances shown was an indecent act." See also *Horn* (1923) 40 Can.Cr. Cas. 117.

Provided that this difficulty of terminology is borne in mind, it may be said that there are, broadly, three views on the meaning of the term "indecent assault":—

(1) that the act which constitutes the assault must also be an act " in itself indecent."
(2) that the act constituting the assault may be " decent in itself " provided that it is accompanied by acts of indecency.
(3) that the act constituting the assault may be " decent in itself " provided that it is accompanied by " circumstances of indecency " and that for this purpose a mere indecent motive is sufficient.

The distinction between (2) and (3) is complicated by the difference of judicial opinion on the question whether indecent expressions are to be regarded as indecent acts or merely as evidence of an indecent motive.

The first view was accepted by a majority (Gardiner J. and De Villiers A.J., Searle J. dissenting) of a South African appellate court in *Abrahams* [1918] C.P.D. 593:—

> " An assault involves an act of physical violence. . . . When, therefore, assault is qualified by the term ' indecent,' it seems to me that it is the act of violence that is qualified; there must be an act of indecent physical violence. I do not think that the qualification refers to the motive or purpose of the offender. . . . Nor . . . do I consider that indecent language or even indecent acts applied to the accused himself and not to the complainant, can make an assault indecent. If, for instance, a man were to expose his person, though this might be indicative of intent to rape, I do not think it would make a catching hold of a girl by the arm an indecent assault. . . . But for an indecent assault, the violence constituting the assault must in itself be indecent; there must be some indecent handling of the complainant."

This view is now firmly established in South Africa, *Abrahams* having been followed in *Hart* [1931] O.P.D. 102, *Herbst* [1942] A.D. 434, *Jeremiah* 1947 (2) S.A.L.R. 938 and *M* [1947] (4) S.A.L.R. 489; *cf.* also *Curtis* [1926] C.P.D. 385.

In his dissenting judgment, Searle J. said ([1918] C.P.D. 597–598):—

> " Now it seems to me that if an assault is accompanied by circumstances of indecency, for example, by indecent language employed by the accused towards the complainant at the time, such language showing the nature and object of the assault, the assault is an indecent one. . . . Though it may be that an assault with indecent intent, is, as contended for the Crown, an indecent assault, it is not necessary now to go so far as to say that every assault for the purpose of committing an indecent act, would be an indecent assault; it is sufficient

> to say that where the indecency is so closely connected with the physical violence as to form a material part of the whole occurrence complained of, the crime of indecent assault is committed."

A view similar to that taken by Searle J. had been adopted by the Supreme Court of Ontario in *Chong* (1914) 32 Ont.L.R. 66, where Middleton J. during the argument asked: "Does not indecent assault mean an assault which has in it an element of indecency?"; and in the course of the judgment said at p. 67:—

> "It appears to me that an act in itself ambiguous may be interpreted by the surrounding circumstances and by words spoken at the time the act is committed. Mr. Moss conceded that if a man took hold of a woman and attempted to drag her into a brothel, that would constitute an indecent assault. It is in each case a question of fact whether the thing which was done, in the circumstances in which it was done, was done indecently. If it was, an indecent assault has been committed."

*Chong* has now been approved by the Supreme Court of Canada in *Quinton* [1947] S.C.R. 234, where Estey J. cited the above passage and continued (p. 237): "His spoken words which were part of his conduct evidenced the intention of the accused and determined the criminal quality of his act"; and Kellock J. said at p. 240: "It is not necessary that the act constituting the assault be in itself indecent in its nature."

In the New Zealand case *Turner* (1900) 18 N.Z.L.R. 874, where the accused had used indecent expressions to a girl of eleven and a short time later pushed her and slightly struck her on the arm, Stout C.J. said:—

> "I do not think this assault comes within the charge of indecent assault under the Code. In my opinion there must be some indecent acts done by the accused. Mere indecent expressions are not enough unless the assault either amounts to an attempt to have connection, or is in some way connected with indecency, or has reference to the expressions used. Here there was no indecent act done to the girl, nor did the accused behave indecently in any way save by using indecent expressions. I do not think that is enough."

On similar facts the Supreme Court of New South Wales had come to the same conclusion in *Culgan* (1898) 19 L.R.(N.S.W.) 166, where a mere indecent motive was held not sufficient to make an assault an indecent assault, the question being left open whether, if the indecent language had actually accompanied the assault instead of preceding it, the assault could be held to be indecent. The

Supreme Court of Victoria also, by holding that there is not necessarily any element of indecency in an assault with intent to rape, has, in effect, decided that a mere indecent motive is not sufficient to turn an assault into an indecent assault (*Nisbett* [1953] V.L.R. 298; [1954] Crim.L.R. 280). In a case of shoe fetishism at Lincoln Assizes Streatfeild J. ruled that an assault committed to gratify an indecent motive is not an indecent assault unless it is accompanied by circumstances of indecency towards the person alleged to have been assaulted: *George* [1956] Crim.L.R. 52.

In *Donovan* [1934] 2 K.B. 498 the appellant was convicted of indecently assaulting a girl by having beaten her with a cane " in circumstances of indecency " in order to gratify a perverted lust but the Court of Criminal Appeal quashed the conviction on another ground.

Professor Glanville Williams has observed that " There is a one-way traffic in legal decisions, for while overseas courts refer to and consider English decisions, English courts rarely return the compliment. Probably this is not arrogance, but just that the English counsel did not know the overseas cases to cite; and he did not know them because the treatise he used did not mention them " ([1954] Crim.L.R. 399, reviewing Archbold, 33rd ed.). When, in *Beal* v. *Kelley* (1951) 35 Cr.App.R. 128, the important question of the meaning of " indecent assault " came at last before the English Divisional Court, in spite of the wealth of Commonwealth authority, the only case cited was an English civil case, *Fissington* v. *Hutchinson* (1866) 15 L.T. 390. In *Beal* v. *Kelley* the respondent had been charged with indecent assault upon a boy aged fourteen; the justices, being of opinion that the facts disclosed the commission of an act of gross indecency with which they were incompetent to deal summarily, had dismissed the case. On appeal by case stated the Divisional Court sent the case back to the justices with a direction that they should convict of indecent assault and Lord Goddard C.J., delivering the court's judgment (1951) 35 Cr.App.R. 129–130, observed that the respondent had exposed his person and asked the boy to handle it, and continued:—

> " The boy refused to do so, whereupon the respondent caught hold of him and pulled him towards himself. There at any rate, was the assault, a hostile act, because the act was against the boy's will. It does not matter that the boy could not give consent; the act was in fact against his will. It is said that that was not an indecent assault. Why not? In my opinion the definition given in Archbold's *Criminal Pleading, etc.* (32nd ed., p. 1067) of an indecent assault is perfectly right: 'An assault accompanied with circumstances of indecency on the

> part of the prisoner,' that is to say, indecency offered towards the person alleged to have been assaulted. If a person is assaulted, that is to say, if there is a hostile act with every circumstance of indecency, I cannot see why it is not an indecent assault. If a man assaults a woman, at the same time exposing his person to her, I have no doubt that is an indecent assault on a female, just as I have no doubt that the conduct of the respondent was an indecent assault."

The answer to the question " What constitutes an indecent assault? " has been summarised as follows in 16 *Journal of Criminal Law* at p. 91:—

> " The law seems to be in England, therefore, that kissing a woman with a lewd motive and handling in circumstances of obvious indecency are both indecent assaults, but neither *R.* v. *Baker* nor *Beal* v. *Kelley* goes quite so far as to lay down that a mere non-indecent handling accompanied only by indecent words (as in *R.* v. *Chong* and *R.* v. *Abrahams*) constitutes an indecent assault."

### V. The Intrusion of the Doctrine of the Hostile Act

In *Beal* v. *Kelley* (1951) 35 Cr.App.R. 128 (see p. 533, above), the Divisional Court held that the respondent's act of pulling the boy's arm after the boy had objected to the respondent's behaviour was " the assault, a hostile act " and that since it was accompanied by indecency offered towards the boy it constituted an indecent assault. The respondent's act was " hostile " " because the act was against the boy's will " (35 Cr.App.R. 129); but would the decision have differed if the act had not been against the boy's will? The court went on to say:—

> " It does not matter that the boy could not give consent; the act was in fact against his will."

This dictum suggests that even if the act had not been against the boy's will, section 1 of the Criminal Law Amendment Act, 1922, would have negatived his consent and turned the act (of pulling the boy's arm) into a constructive " hostile act." In other words, in *Beal* v. *Kelley* not only did the Divisional Court decide that non-indecent handling of a non-consenting person in circumstances of indecency can amount to an indecent assault: the court also suggested that non-indecent handling of a *consenting* child (or young person under the age of sixteen) in circumstances of indecency can amount to an indecent assault.

*Beal* v. *Kelley* was decided (by Lord Goddard C.J., Hilbery and Pilcher JJ.) on October 5, 1951, 12 days before the decision of the

Divisional Court (Lord Goddard C.J., Hilbery and Slade JJ.) in *Fairclough* v. *Whipp* (1951) 35 Cr.App.R. 138, the case which put an end to the doctrine of the passive indecent assault (see above, p. 455). Two months later, on December 11, Lord Goddard C.J., delivering the judgment of the Court of Criminal Appeal (Lord Goddard C.J., Hilbery and Barry JJ.) in *Burrows* (1951) 35 Cr. App.R. 180 (a case in which the facts may be regarded, for the present purpose, as similar to those in *Fairclough* v. *Whipp* except that the victim was a boy), said (pp. 182–3):—

> "The Divisional Court has held in *Fairclough* v. *Whipp* that an invitation to a child to touch a person indecently cannot be said to be an indecent assault because there was no hostile act towards the child, and unless there is a hostile act, there cannot be an assault. . . .
>
> "In view of the decision in *Fairclough* v. *Whipp* . . . if" the appellant "did not in any way threaten the boy or commit a hostile act against the boy, that did not amount in law to an indecent assault."

It must be respectfully maintained that the Divisional Court in *Fairclough* v. *Whipp* did *not* decide that a threat or hostile act was necessary to constitute an indecent assault on a child or young person under the age of sixteen. The decision in *Fairclough* v. *Whipp* was that in order to constitute an assault "there must be an act done to a person" (see above, p. 456). It was not in *Fairclough* v. *Whipp* but in *Beal* v. *Kelley* that the Divisional Court had used the expression "hostile act" and in *Beal* v. *Kelley* the court suggested that the decision would have been the same even if the boy had consented. The suggestion in *Burrows* that there must be a "hostile act" is therefore unfortunate, since it implies that there must be an act done without the consent of the child; and it is submitted that whether or not the child consents is irrelevant in view of section 1 of the Criminal Law Amendment Act, 1922.

The dicta in *Burrows* are consistent with *Fairclough* v. *Whipp* if the expression "hostile act" is taken to mean "something sufficiently active to amount to an assault." This was the interpretation put upon the expression by C. W. L. Jervis, who concluded, after examining the cases of *Fairclough* v. *Whipp, Beal* v. *Kelley* and *Burrows* (116 J.P.J. 84), that:—

> "The 'hostile act' necessary to constitute an assault need be only very slight. Even if the prisoner be passive *ab initio,* he may later do something, in the majority of cases, which amounts to an active and hostile act, however small. Generally speaking the prisoner's case, in such circumstances, will be

> devoid of merit and it is thought that the courts will not be slow in finding the necessary ' hostile act ' . . .
>
> " Where the prisoner is a woman who, without committing any ' hostile act,' procures a boy under sixteen to act indecently with her, one is driven to the remarkable conclusion that no offence is committed. This would appear to be so even if full intercourse takes place, although in the nature of things, the woman may then do something sufficiently active to amount to a ' hostile act ' and enable a charge of indecent assault to succeed."

Unfortunately this liberal interpretation of the expression " hostile act " has now been discredited by the decision of the Divisional Court in *D. P. P.* v. *Rogers* (1953) 37 Cr.App.R. 137.

In *D. P. P. v. Rogers* the respondent, being alone in his house with his daughter aged eleven, on two occasions

(1) with the intention of conducting himself indecently towards his daughter, placed his arm around her shoulders and led her upstairs ; and then

(2) exposed himself and told her to handle him indecently (which she did although " she did not wish to do so ").

On the second occasion that he placed his arm around the girl's shoulders, she knew what his intention was, *i.e.,* she knew that he was about to offer indecency towards her, and the justices found as a fact she did not consent but merely " submitted " to his placing his arm around her shoulders. On a charge for indecent assault the justices took the view that the case was indistinguishable from *Fairclough* v. *Whipp* and dismissed the case. On appeal by case stated the Divisional Court reluctantly upheld their decision. It is proposed to consider the two arguments, which were advanced on behalf of the Director of Public Prosecutions, for holding that the respondent had committed an indecent assault.

The first argument is as follows. To constitute an indecent assault there must be:—

(1) indecency offered towards the victim, accompanied by

(2) an assault against the victim (*Beal* v. *Kelley*)

(The word " assault " is here used as including " battery ").

(1) The indecency was clearly present, and

(2) There was an assault because the placing of the arm around the child's shoulders " would," to use the words of Lord Goddard C.J. in *Fairclough* v. *Whipp* (1951) 35 Cr.App.R. 138, 140, " have been an assault if done against her will," and therefore " it would also be an assault if it was done with her consent and is of an indecent nature because she cannot consent to an indecent assault."

By refusing to take this opportunity to decide that non-indecent handling of a consenting child in circumstances of indecency can amount to an indecent assault, the Divisional Court, if one may say so with respect, seems to have put strange interpretations on its own earlier decisions, *Fairclough* v. *Whipp* and *Beal* v. *Kelley*.

*Fairclough* v. *Whipp* (*as interpreted in D. P. P.* v. *Rogers*)

It has been seen that in *Fairclough* v. *Whipp* the Divisional Court said (1951) 35 Cr.App.R. 140: " Before we come to the question whether there was an indecent assault, we must consider whether there was an assault." If this dictum is taken out of its context and interpreted literally, it is clearly wrong, because, if the person alleged to have been assaulted is under the age of sixteen, there is one element which is essential (subject to certain exceptions, see above, p. 450) to an assault, but which is not necessary for the commission of an indecent assault, namely, lack of consent on the part of the alleged victim. Read in its context, however, the dictum is clearly intended to mean: " Before we come to the question whether there was an indecent assault we must consider whether that which was done would have been an assault if done against the child's will." In *D. P. P.* v. *Rogers*, however, the Divisional Court said, in effect, that before they could decide whether there had been an indecent assault they had to decide whether there had been lack of consent on the part of the child. This is a strange proposition in view of section 1 of the Criminal Law Amendment Act, 1922, yet the following passage is taken from the court's judgment delivered by Lord Goddard C.J. ( (1953) 37 Cr.App.R. 137, 139):—

> " Before a man can be found guilty of an indecent assault it has to be found that he was guilty of an assault, for an indecent assault is an assault accompanied by indecency, and if one could show here that the respondent had done anything towards his child which by any fair use of language could be called compulsion, or acted, as I have said in other cases. in a hostile manner towards her, that is, with a threat or a gesture which could be taken as a threat, or had pulled a reluctant child towards him, that would undoubtedly be an assault, and if it was accompanied by an act of indecency, it would be an indecent assault."

If there is any doubt that, by using the words " compulsion," " hostile," " threat " and " reluctant," the Divisional Court intended to lay it down that consent was a defence to the charge of indecent assault on the child, in spite of section 1 of the 1922 Act, such doubt is removed at the end of the judgment where in unmistakable language the court said (37 Cr.App.R. 140):—

> "It is quite true that *there might be a case in which the evidence showed that what was being done was really done against the will of the child* (if the father had used compulsion on the child. Here no force was used and nothing was done except what any father may do . . .)."
>
> The passage in brackets does not appear in the version of the report at [1953] 1 W.L.R. 1019 and the report in [1953] 2 All E.R. 646 has instead: "The respondent used no compulsion, no force, on the child *to go upstairs* . . ." (Italics mine.)

*Beal* v. *Kelley* (*as interpreted in D. P. P.* v. *Rogers*)

In *D. P. P.* v. *Rogers* the Divisional Court said (37 Cr.App. R. 140):—

> "*Beal* v. *Kelley* was really quite a different case, because there the defendant exposed himself to a boy and asked the boy to handle him and, when the boy refused to do so and began to go away, the defendant ran after the boy and got hold of him and pulled him towards himself. As we have pointed out, there can be an assault without battery, and in that case there was undoubtedly an assault because the boy wanted to get away from this disgusting behaviour."

With respect, this passage is puzzling. It is true that the Divisional Court had pointed out that "there can be an assault without battery" (see *Fairclough* v. *Whipp* (1951) 35 Cr.App.R. 138), but *Beal* v. *Kelley* was a case in which there was in fact a battery, the respondent's act of pulling the boy's arm involving an actual, not merely a threatened, impact. It seems that in *D. P. P.* v. *Rogers* the court regarded *Beal* v. *Kelley* as a case where the assault was an "assault" in the technical sense (*i.e.*, without battery), but it is clear from the above passage that the court regarded the battery (*i.e.*, the pulling of the boy's arm) as an important factor in determining whether there had been an "assault." Can it be that the court regarded the battery as a necessary element of the "assault" purely as a matter of adjectival law, *i.e.*, merely as evidence that the boy did not consent to the "assault"? On this interpretation *Beal* v. *Kelley* would not be an authority for the proposition that an assault, "decent in itself" but accompanied by circumstances of indecency, can amount to an indecent assault, and would be instead a case where the assault was in itself indecent, as in *Rolfe* (1952) 36 Cr.App.R. 4.

### *The attempt to restore the doctrine of the passive indecent assault*

The second argument for holding that the respondent in *D. P. P.* v. *Rogers* was guilty of an indecent assault was that, since the child was alone in the house with the respondent and was ordered by all the weight of parental authority to handle the respondent, the handling was an involuntary act on her part. According to this argument the handling constituted a battery in which the impact was occasioned by the movement of the victim herself. If, as was contended, the handling was in fact an involuntary act on the child's part, the respondent could be regarded as the sole cause of the impact. Thus, it is submitted, *D. P. P.* v. *Rogers* could be distinguished from *Fairclough* v. *Whipp* where the child had *in fact*, although (one would have thought) not *in law* consented.

Although the Divisional Court did not deal specifically with this latter argument, it seems that the court rejected it on the ground that the act was in fact not against the child's will. Apparently it would have been different " if . . . the respondent had done anything towards his child which by any fair use of language could be called compulsion " or if " the evidence showed that what was being done was really done against the will of the child." With respect, it is observed that even before Parliament made it no defence, on a charge for indecently assaulting a child, that the child consented to the act of indecency, the judges drew a distinction between consent and mere submission in cases of indecent assaults upon children. Thus in *Lock* (1872) L.R. 2 C.C.R. 10, 12 Brett J. observed: " In cases of criminal assault by a father upon his daughter I have more than once, with the concurrence of Willes J., told the jury that in the case of a young child and an adult they must consider whether there has been mere submission on the part of the child, known to be merely so by the adult, or whether there has really been consent " (and see the cases cited by C. B. Orr at 119 J.P.J. 392). Moreover, even on an indictment for rape, the prosecution does not have to prove that the act was committed against the woman's will, but merely that it was without her consent: *Fletcher* (1859) Bell. 63.

Until *D. P. P.* v. *Rogers* it had never been suggested, since the passing of the 1922 Act, that consent could be a defence to a charge of indecent assault on a person under sixteen, but *D. P. P.* v. *Rogers* goes dangerously near to ignoring the 1922 Act. Already a court of quarter sessions in New South Wales has held, as a result of *D. P. P.* v. *Rogers,* that where two males indecently handle each other they are not guilty, in the absence of some hostility or compulsion, of indecent assault, in spite of section 81 of the New South Wales Crimes Act (1900–1951) which provides:—

> "Whosoever commits an indecent assault upon a male person of whatever age, *with or without the consent* of such person, shall be liable to penal servitude for five years" (italics mine).

On appeal by the Crown, however, the Supreme Court of New South Wales, sitting *in banc*, has held that this is not the law (*B. and L.* [1954] 71 W.N.(N.S.W.) 138, referred to at [1955] Crim. L.R. 30; in this case not only *D. P. P.* v. *Rogers* and *Fairclough* v. *Whipp*, but also *Hare* was cited).

In conclusion, it is proposed to consider the possibility that the explanation for the decision in *D. P. P.* v. *Rogers* is to be found in the peculiar wording of section 1 of the Criminal Law Amendment Act, 1922.

## VI. The Effect of Section 1 of the Criminal Law Amendment Act, 1922

Section 1 of the Criminal Law Amendment Act, 1922, does not provide that it is no defence that the person under sixteen "consented": it provides that it is no defence that he or she "consented to the act of indecency" (contrast the Mental Deficiency Act, 1913, s. 56 (3): see p. 447 above). This assumes that an "act of indecency" is necessary to this offence; but it was in connection with this section that Kenny queried: "Is an indecent *act* essential to this offence, or does it suffice that an assault, decent in itself, was committed with an indecent *aim*?" (*Outlines of Criminal Law,* 16th ed., p. 154, n. 8). *Beal* v. *Kelley* (1951) 35 Cr.App.R. 128, at any rate, shows that, to constitute an indecent assault, the assault (or battery) need not be in itself an "act of indecency," but that it is sufficient if the assault is accompanied by an "act of indecency." According to the wording of this section, although it is no defence that the person consented to "the act of indecency," it would appear to be a defence that he or she consented to "the alleged assault (or battery)"; for "the question of consent is material, not on the issue of indecency, but on the fundamental question of an assault" (Tremeear, *Criminal Code* (Canada), 5th ed. (1944), p. 334). Accordingly it would seem that this section applies only where the alleged assault (or battery) is also in itself an "act of indecency" and does not apply where the alleged assault is decent in itself but accompanied by an "act of indecency."

It is submitted, however, that this is not the true effect of this section, and that if an assault (or battery), decent in itself, is accompanied by an "act of indecency," the assault itself may be regarded as an " act of indecency " within the meaning of section 1 of the 1922 Act. The word " indecent " has no definite legal meaning (*cf. Webb* (1848) 2 C. & K. 933, 938, *per* Pollock C.B.) and " an act in itself ambiguous may be interpreted by the surrounding circumstances " (*Chong, per* Middleton J. (1914) 32 Ont.L.R. 66). Apart from Kenny nobody appears to have put any significance on the expression " consented to the act of indecency " in this section; thus it is stated in Archbold that " Consent is no defence to an indictment for an indecent assault, where the person assaulted is under the age of sixteen years " (33rd ed., p. 1123; similarly at p. 1103; Glanville Williams, *Criminal Law, The General Part*, p. 260; Hughes in 103 L.J. 116; Orr in 119 J.P.J. p. 392). There is nothing strange in the proposition that non-indecent handling of a consenting child in circumstances of indecency can amount to an indecent assault. In the United States " an assault results even from the most willingly accepted contact with the intent to commit statutory rape. The general view in the States is that since a girl under statutory age cannot consent to intercourse, she cannot consent to a touching where the male has the intent to have intercourse with her " (29 N.Y.U.L.R. p. 1488).

It is submitted that *D. P. P.* v. *Rogers* (1953) 37 Cr.App.R. 137 is no authority for the proposition that section 1 of the 1922 Act applies only where the alleged assault is also in itself an " act of indecency " and that this case laid down no principle of law but was decided on its own special facts, because:—

1. The court did not purport to lay down any novel principle of law but said that the case was indistinguishable from *Fairclough* v. *Whipp* (1951) 35 Cr.App.R. 138.
2. The 1922 Act was not mentioned, either expressly or impliedly, in the court's judgment.
3. The respondent was the child's father and the placing of his arm around her shoulder was an act which " any father may do."
4. The justices found as a fact that the child did not consent but merely " submitted " and this confused the issue in the Divisional Court. With great respect, the issue should not have been whether or not the child consented, but whether, *even if she did consent,* the respondent was guilty of an indecent assault as a result of section 1 of the 1922 Act.
5. The alleged battery (placing of the respondent's arm around his daughter's shoulders) did not accompany, but preceded the " act of indecency," so that the indecency was not, to use the words of Searle J. in *Abrahams* [1918] C.P.D. 598, " so closely connected with the physical violence as to form

> a material part of the whole occurrence complained of." *Quaere* whether the respondent in *D. P. P.* v. *Rogers* would have been guilty of indecent assault under section 76 of the Crimes Act (New South Wales) which provides: " Whosoever assaults any female and, at the time of or immediately before or after such assault, commits any act of indecency upon or in the presence of such female, shall be liable to imprisonment. . . ." By section 77 if the female is under sixteen her consent " shall be no defence " to a charge under section 76.

Accordingly, it is submitted that if a clear-cut case occurs, free from such extraneous considerations as arose in *D. P. P.* v. *Rogers,* it is still open for the Divisional Court or the Court of Criminal Appeal, notwithstanding *D. P. P.* v. *Rogers* and the wording of section 1 of the 1922 Act, to hold that non-indecent handling of a consenting child (or young person under the age of sixteen) in circumstances of indecency can amount to an indecent assault.

It is further submitted that, since a battery may be committed where the impact is occasioned by the movement of the victim himself provided that the accused has intentionally caused that impact, it would be open for the House of Lords, should an opportunity occur (*e.g.,* if the Court of Criminal Appeal quashed a conviction in circumstances similar to those in *Burrows* (1951) 35 Cr.App.R. 180), to overrule the decisions of the Court of Criminal Appeal in *Burrows* and of the Divisional Court in *Fairclough* v. *Whipp* and to restore the doctrine of the passive indecent assault. But in the present state of the law a woman who induces a boy under the age of sixteen to have intercourse with her is not *ipso facto* guilty of a criminal offence.

# Practice and Procedure

## Magistrates' Courts

### *Attempting to commit malicious damage*

To place nails in the road with the intention of puncturing the tyres of cars driven over them would, in common parlance, be called a criminal act, but a recent case in a Metropolitan Magistrates' Court showed that there are difficulties in framing a charge to meet such conduct. The defendant in that case was a licensed police messenger who spent most of his time running errands for taxi drivers and looking after their cabs in a certain street where they were accustomed to leave them while having meals. The owner of a private car parked in this street watched the defendant from an office window and saw him push something in front of one of the wheels of the car, in such a position that the wheel would go over the object when the car was driven away. An office colleague of this witness saw a similar action as the defendant stood by another private car. In front of a wheel of each car there was found a crushed piece of match-box with a nail sticking upright through it; the pieces of match-box fitted together. It was suggested that the object of the defendant was to inconvenience motorists who parked at this spot so that they would be discouraged from leaving their cars there again and thus leave it free for taxi drivers to use.

A summons was taken against the defendant charging him with having attempted to cause malicious damage to a motor-vehicle, contrary to common law. At the hearing the question arose whether it was necessary to put a value to the damage, so that the jurisdiction of the court should be clear. The solicitor for the prosecution made the very reasonable submission that he could not estimate damage which had not actually occurred. It was pointed out, however, that if the court accepted jurisdiction in the matter it would have to be on the basis that an attempt to commit an indictable offence was alleged, because it is very doubtful whether an attempt to commit a purely summary offence is contrary to the common law, and it certainly is not an offence which may be dealt with summarily. But a person cannot be committed for trial for an offence of malicious damage unless the damage exceeds five pounds in value (see section 14 (2) of the Criminal Justice Administration Act, 1914); malicious damage to the value of £5 or less is, therefore, a purely summary offence. The prosecuting solicitor's reply to this was that he was alleging an attempt to commit an offence against section 51 of the Malicious Damage Act, 1861, that this was an offence specified in the First Schedule to the Magistrates' Courts Act, 1952, and therefore, by virtue of paragraph 19 of that Schedule, an attempt to commit it was triable summarily with the consent of the accused. The learned magistrate, however, did not feel he could accept the proposition that the defendant might lawfully elect to be tried by a jury for attempting to commit an offence if there could not be a committal for trial in respect of the completed offence; and he called on the prosecution to add a value to the statement of the charge. As this alleged an attempt to damage a car, the only figure the prosecution could supply which had any bearing on the matter was the value of the car, namely £400, but it was realised that the defendant could hardly be accused of attempting to cause £400 worth of damage with one nail, unforeseeable though the exact extent of the consequences of his action might have been. With the consent of the court, the charge was accordingly amended by stating the offence to be against a tyre of the car and not the car itself; evidence was then called to show that the value of a tyre of this kind was between £5 and £6.

The defence was a denial by the accused of the actions attributed to him and an assertion that somebody else must have been responsible for placing the nails where they were found. He was, however, found guilty on the amended charge. As a result of the line of defence adopted there was no legal argument on the form of the amended charge; but it seems open to question whether an attempt to puncture a motor tyre can be said to be an attempt to cause damage to that tyre to the extent of its full value. And it is the value of the damage, not of the article damaged, which decides jurisdiction in charges brought under section 51 of the Malicious Damage Act, 1861, and section 14 of the Criminal Justice Administration Act, 1914. In any case, it seems that, if the cost of a motor tyre did not exceed five pounds, a conviction for attempting to damage it could not be obtained in any court, however deserving of punishment the culprit might be. [A. E. JONES.]

## Summary Justice

### *Agriculture*

Pig. Moving a pig without keeping a record and failing to conform to the conditions of the licence granted for the movement of the pig; fined £2; Gebhard: Wakefield City Magistrates' Court (*Wakefield Express,* June 9).

### *Aviation*

Low flying. Student-pilot flying lower than pit heap; fined £20 for unlawfully flying an aircraft so that its low altitude caused unnecessary danger to persons and dwellings contrary to section 11 of the Civil Aviation Act, 1949; Appleby: Newcastle-upon-Tyne Magistrates' Court (*Manchester Guardian*, June 7).

### *Birds*

Netting. Man, aged 70, catching wild birds with a net contrary to section 5 of the Protection of Birds Act, 1954, and keeping them for showing; as a result of the prosecution he had disposed of his aviary; given an absolute discharge, the net confiscated; Hills: Eastbourne Magistrates' Court (*Evening Standard*, June 4).

Two boys, aged 11, taking five-week-old blue tits from a tree; one put on probation for a year, the other fined 5s.: Eastbourne Juvenile Magistrates' Court (*Evening Standard*, July 3).

### *Children*

Neglect. Man and woman leaving baby, aged 8 months, unattended in a car while they went to an opera; man fined £10, woman £5 for neglecting child in manner likely to cause unnecessary suffering; Gadd, Wilkinson: Leeds Magistrates' Court (*Manchester Guardian*, June 22).

### *Damage*

Car. Drunken man smashing motor-car bonnet with his fist, doing £15 worth of damage; fined £7 for being drunk and disorderly and causing damage to the car, ordered to pay £1 costs and to repay the £15 damage; Baird: Smethwick Magistrates' Court (*Birmingham Mail*, June 4).

### *Food and drugs*

Selling food unfit for human consumption. Firm selling coconut-coated sponge cake with cigarette stub in it; fined £5; W. I. Ragg & Son, Ltd.; Smethwick Magistrates' Court (*Birmingham Mail*, June 4).

### *Game*

Two American airmen trespassing in search of game, killing a partridge in the close season and killing a partridge on a Sunday; one illegally transferring a rifle, the other illegally acquiring it; each fined £2 for trespassing, £3 for killing a partridge on a Sunday, the magistrates taking the view that this covered the summons for killing a partridge in the close season; each fined £5 for the transferring of the rifle; Hancock, Bushman: Margate Magistrates' Court (*Manchester Guardian*, June 21).

### *Highways*

Obstruction. Seven caravans parked on roadside; occupants each fined £2 and ordered to pay 15s. costs for obstructing the highway; Wilkes, Henderson and others: Wythall Magistrates' Court (*Birmingham Mail*, June 1).

*Larceny, etc.*

Stealing by finding. Man taking purse containing £2 and other articles valued at £5 which he found in street; fined £2, ordered to pay 14s. costs; Hewison: Plymouth Magistrates' Court (*Western Evening Herald,* June 6).

False representation. Rent collector impersonating police officer in order to make tenants of a house open their door; fined £5; Shannon: Huddersfield Magistrates' Court (*Telegraph and Argos,* June 13).

*Local by-laws*

Parks. Using bad language in Bank Park; fined £2; Hinton: Warrington Magistrates' Court (*Liverpool Echo,* June 28).

Litter. Dropping litter on a road; fined £1, chairman gave warning that in future cases maximum penalty of £5 would be imposed: Exmouth Magistrates' Court (*Evening Standard,* June 11).

*Railways and ships*

Railways. Twenty boys, aged between nine and fourteen, trespassing on the railway embankment for "train spotting"; each given an absolute discharge on payment of four shillings costs: Stafford Juvenile Court (*Manchester Guardian,* June 29).

*Road traffic*

Dangerous driving. Youth, aged sixteen, driving motor-cycle dangerously, driving without insurance, having no driving licence, no excise licence, no speedometer and failing to notify change of ownership of the machine; sent to detention centre at Kidlington for three months: Smethwick Juvenile Court (*Birmingham Mail,* June 6).

Drunk in charge. Man wheeling his motor-cycle home after a wedding celebration; his cousin had removed the leads to the sparking plugs to stop him riding it; fined £5 for being in charge of the motor-cycle while under the influence of drink and disqualified from driving for a year; Fulbrook: Tottenham Magistrates' Court (*Evening Standard,* June 7).

Insurance. Former police sergeant driving his own car on official police business when it was not insured or taxed and when he had no driving licence; fined £5 and disqualified from driving for a year for the first offence, fined £2 on each of two summonses for having no road fund licence and £2 for having no driving licence; Rhodes: Barnsley Magistrates' Court (*Manchester Guardian,* June 7).

Proper control of vehicle. Motorist shaving with an electric razor while driving a car; summons for not having proper control of the vehicle dismissed; Fairrie: Willesden Magistrates' Court (*The Daily Telegraph,* June 19).

Speeding. Woman driving through town at 45–50 m.p.h.; said she was admiring the trees; fined £2; Dennison: Bedford Magistrates' Court (*Evening Standard,* June 12).

Towing. Two motor-cyclists towing a car on their solo machines, the second driving without L plates; car-owner aiding and abetting them and using the car in a dangerous condition; first motor-cyclist fined £1, second £2, and car-owner fined £3; Armstrong, Gardner, Hughes: Liverpool County Magistrates' Court (*Liverpool Echo,* June 26).

*Town and country planning*

Enforcement notice. Permitting land to be used as a rubber dump in contravention of an enforcement notice; fined £250: Tamworth Magistrates' Court (*Birmingham Mail,* June 26).

Enforcement notice. Living in caravan on farmland in contravention of borough council enforcement notice; fined £1; Jones: Solihull Magistrates' Court (*Birmingham Mail*, June 21).

# Case and Comment

The reports of cases to which initials are appended hereunder have been specially prepared for *The Criminal Law Review* by the following reporters:—

HENRY PALMER, *Barrister-at-Law*
J. D. PENNINGTON, *Barrister-at-Law*

**Aliens**—*Recommendation for deportation—wife and family in this country*

R. *v.* GAGNON[1] (Court of Criminal Appeal: Streatfeild, Ormerod and Pearce JJ.: June 18, 1956).

G., having been convicted at Southampton Magistrates' Court of larceny from the person, was sentenced at quarter sessions to imprisonment and recommended for deportation. G. was thirty-two years of age and a citizen of the United States of America. He came to this country at the age of six and had six previous convictions here. He had been twice bound over for shopbreaking and larceny; he was sent to Borstal training in 1941; he was fined for larceny in 1951; he was sentenced to two years' corrective training for receiving in 1952; and he was convicted in 1955 of being found on enclosed premises. From 1943 to 1947, G. had served in the United States Navy and merchant navy. He was a married man with a family in this country. On appeal to the Court of Criminal Appeal against the recommendation for deportation:—

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[1] The appellant appeared in person. The Crown was not represented.

*Held,* dismissing the appeal, that having regard to G.'s record and to the fact that he had served during the war in the United States Navy and merchant navy, there was no reason why he should not now be recommended for deportation on the ground that he had a wife and young children in this country. That was a matter which would be considered by the Home Secretary in considering whether the recommendation should be adopted. The court thought that, having regard to G.'s behaviour in this country, quarter sessions were well justified in making the recommendation. [H. P.]

COMMENTARY. If on an appeal the Court of Criminal Appeal certifies to the Home Secretary that it does not concur with a recommendation for deportation made by a lower court, the recommendation has no effect, although the Home Secretary may still deport the alien if he "deems it to be conducive to the public good": Aliens Order, 1953 (S.I. No. 1671), art. 20. Ordinarily the Court of Criminal Appeal will not interfere with such a recommendation, but will leave the matter to the Home Secretary, who "is in a better position . . . to make inquiries": *R.* v. *Josephson* (1914) 10 Cr.App.R. 8. It has, however, set aside recommendations for expulsion where the appellant was only five when he came to England and would have to be deported to Russia, did not speak a word of Russian and had an English wife and a family in this country (*R.* v. *Friedman* (1914) 10 Cr.App.R. 72); where the appellant was a Russian Pole who had lived forty years in this country, the state of affairs in Russia at the time being taken into consideration (*R.* v. *Shaffner* (1920) 14 Cr.App.R. 131); where the appellant was a Pole, who had lived many years in this country and had eleven children, three of whom served in the 1914–1918 war (*R.* v. *Gilbert* (1921) 16 Cr.App.R. 34); and where there was no practical mode by which an order for deportation could be executed, the judge of the lower court having made the recommendation because he hoped to facilitate the imposing of certain restrictions upon the alien by the Home Secretary (*R.* v. *Goldfarb and Szczenslive* (1936) 25 Cr.App.R. 161).

See Archbold, 33rd ed., 229, 314.

**Betting**—*Pool Betting Act, 1954—betting carried on by post—collection of money by agent*

HARRISON *v.* SHEARS [2] (Q.B. Divisional Court: Lord Goddard C.J., Ormerod and Donovan JJ.: June 28, 1956) (*The Times*, June 29, 1956).

Three officials of a football supporters' club were registered with the local authority under section 1 of the Pool Betting Act, 1954, as promoters of a pool betting business. They appointed thirty agents of which the defendant was one. He was employed by a firm of printers and each week he received completed forecast coupons with accompanying stake money from some forty competitors whom he had enrolled at his employers' premises. He then bought a postal order for the total amount of stake money received and sent it with the coupons by post to the promoters' office. The collection of the stake money at his employers' premises was without the knowledge of his employers. The defendant was convicted of using a room for the purpose of a ready-money betting office contrary to sections 1 and 3 of the Betting Act, 1853. On appeal:—

*Held,* dismissing the appeal, that if the money had been sent by competitors direct by post to the registered pool promoters at their office no offence would have been committed by virtue of section 10 (2) of the Act of 1954, but that the paying of money to an agent was not permitted by that section. The premises of the defendant's employers were clearly a " place " within section 1 of the Act of 1853, and, therefore, the defendant was rightly convicted. [J. D. P.]

COMMENTARY. Section 10 (2) of the Pool Betting Act, 1954, provides that the Betting Act, 1853, so far as it relates to the opening, keeping or using of houses, offices or rooms or other places for the receipt of money, does not apply in relation to pool betting business carried on by post by a registered pool promoter.

To prove that a place is used for betting it must be shown that the business of betting is localised there. In *Brown* v. *Patch* [1899] 1 Q.B. 892, Channell J. regarded the important question as being the character of user of a place. An umbrella temporarily fixed in the ground by means of its spiked telescopic handle so as to form a tent has been held to be a place used for betting (*Bows* v. *Fenwick* (1874) L.R. 9 C.P.

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[2] For the defendant: *Phineas Quass Q.C., D. L. Wilkes* (instructed by D. J. A. Griffiths for Thompson, Cook & Babington, Hull). For the prosecutor: *N. F. Stogdon* (instructed by J. F. Croft, Kingston-upon-Hull).

339) and so have a car (*R.* v. *Hunt and Scriven* [1954] Crim.L.R. 714) and a stall at a fair (*R.* v. *Harris* [1954] Crim.L.R. 786).

See Archbold, 33rd ed., 1413, 1415; Stroud's *Judicial Dictionary,* 3rd ed., Vol. 3, p. 2201.

**Children and Young Persons**—*Corroboration of evidence.* See R. *v.* CAMPBELL, p. 553, below.

**Conspiracy**—*Indictment—conspiracy to acquire metals by fraud in Germany to export contrary to English law*

R. *v.* OWEN [3] (Central Criminal Court: Donovan J.: May 18, 1956) ([1956] 3 W.L.R. 252).

Two men were charged on two counts of an indictment with conspiracy to commit a common law misdemeanour by conspiring to acquire lead and other metals in Germany by means of forged documents purporting to show that the metals would be consigned to and not re-exported from Ireland when in fact the metals were to be consigned and sold, *inter alia,* to Russia, thereby evading the Control of Goods (Import Certificates) Order, 1951, and acting " to prejudice the interests of honest English traders in such metals."

On the third and fourth counts the defendants were charged with conspiracy to defraud a German export control department (known as Z.A.K.) by causing Z.A.K., to grant licences to export the metals from Germany, by means of forged documents purporting to be given by a department in Ireland certifying that the metals would be imported into Ireland and not re-exported, well knowing that the metals were in fact to be exported to Russia. On a motion to quash the four counts:—

*Held,* (1) that since the defendants never imported the goods into the United Kingdom, they never became amenable to the Order of 1951 ; and although the charge of acting to the prejudice of honest English traders was relevant to a charge of conspiracy to effect a public mischief that was not the unlawful object in the present case ; accordingly, the first two counts should be quashed. (2) That a conspiracy in this country to defraud persons in Germany in the way alleged was indictable here and, therefore, counts 3 and 4 should be upheld. If such an unlawful object were to be effected in England, the conspiracy would clearly be indictable here, for the unlawful object of an indictable conspiracy could be a tort as well as a crime. [J. D. P.]

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[3] For the Crown: *Neville Faulkes, David Hirst* (instructed by Solicitor, Board of Trade). For the defendants: *Christopher Shawcross Q.C., Sebag Shaw* (instructed by Stikeman & Co.), *Alexander Karmel Q.C., Michael Mann* (instructed by Galbraith & Best); *A. P. Marshall Q.C., W. M. Howard* (instructed by Claude Hornby & Cox).

COMMENTARY. As to counts 3 and 4 Donovan J. was careful to confine himself to the actual point he had to decide and to avoid enunciating any universal principle concerning conspiracies hatched in England for doing something unlawful abroad. In Archbold the only statement relevant to this point is that " a conspiracy entered into in England to do abroad that which would be a crime in England appears to be indictable in England " (33rd ed., p. 1481). The crime of conspiracy is completely committed once the parties have agreed to their object, even if they do nothing in pursuance of that object. *R.* v. *Warburton* (1870) L.R. 1 C.C.R. 274 concerned a conspiracy to defraud a person in Germany by acts to be done there and in that case the question of the validity of the indictment was never raised.

See Archbold, 33rd ed., 1471 *et seq.*

## **Coroner**—*Application to quash verdict of suicide—evidence*

*Ex p.* HORWILL[4] (Q.B. Divisional Court: Lord Goddard C.J., Streatfeild and Donovan JJ.: June 8, 1956) (*The Times,* June 9, 1956).

A university student aged eighteen was found hanged. The day before his death he had lightheartedly scolded his father for having fastened a collar tightly round their dog's neck, and had said: " How would you like it so tightly round your neck? " At the inquest the jury found that the deceased " hanged himself and took his life deliberately whilst the balance of his mind was temporarily disturbed." On an application by the father for an order of certiorari to quash the inquisition, it was suggested that from the conversation on the previous day it could be inferred that the deceased was experimenting on himself.

*Held,* that although there was no reflection on the coroner, it was desirable, in the circumstances, that a further inquisition should be held by another coroner. [J. D. P.]

COMMENTARY. This is the third time in recent months that a verdict of suicide while the balance of the mind was disturbed has come before the court for reconsideration: see also *Re Lawrence* [1956] Crim.L.R. 481 and *R.* v. *Horner, ex p. Jones* [1956] Crim.L.R. 482. In the latter case Singleton L.J. said that it might be that to add " while the balance of the mind was disturbed " to a verdict of suicide was regarded by a jury as a kindness sometimes. But it should not be forgotten that suicide is a criminal offence and the law presumes against that. If there is any doubt the jury should return an open verdict and they ought to return such a verdict rather than arrive at a verdict of suicide while the balance of the mind was disturbed.

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[4] For the applicant: *Sir Frank Soskice Q.C., Julius Silverman* (instructed by Tuck & Mann for George Mitchell Colman & Co., Birmingham).

### **Court of Criminal Appeal**—*Reference of case by Home Secretary—court limited to grounds set out in reference*

R. *v.* CABORN-WATERFIELD [5] (Court of Criminal Appeal: Lord Goddard C.J., Streatfeild and Donovan JJ.: June 5, 1956) ([1956] 3 W.L.R. 277; [1956] 2 All E.R. 636).

C. was convicted at East Sussex Quarter Sessions on May 6, 1954, of shopbreaking and larceny and sentenced to three years' imprisonment. Two others, R. and F., were indicted at the same time. C.'s application for leave to appeal to the Court of Criminal Appeal was dismissed. Subsequently F. put forward a petition to the Home Secretary in which he said that C. was not present when the offence was committed, and the Home Secretary referred the matter to the Court of Criminal Appeal under section 19 (*a*) of the Criminal Appeal Act, 1907. C. contended that the court ought not to restrict itself to the points referred to them by the Home Secretary, but ought to look at the whole of the case and, in particular, at the question as to whether certain evidence had been properly admitted at the trial.

*Held,* dismissing the appeal, that on a reference by the Home Secretary under section 19 (*a*) the court must have regard to the grounds as to why the Home Secretary had referred the case and confine themselves to those grounds. If the Home Secretary referred the whole of a case, which had never previously been before the Court of Criminal Appeal, because the possibility of some defect in law at the trial had been brought to his attention, and also some question of fact, the court could, of course, inquire into questions of law and fact. But where there were specific grounds on which the case was referred, then the court must confine themselves to those grounds. In the present case, the court had not been asked to hear further evidence and, accordingly, the appeal would be dismissed. [H. P.]

COMMENTARY. Section 19 (*a*) of the Criminal Appeal Act, 1907, provides that on a petition for the exercise of the royal prerogative the Home Secretary may "refer the whole case to the Court of Criminal Appeal, and the case shall then be heard and determined . . . as in the case of an appeal by a person convicted." The present case follows the same principle as that in *R.* v. *Sparkes* [1956] Crim.L.R. 411, the court limiting itself to acting as it would on an ordinary appeal. In the previous case of *R.* v. *McGrath* [1949] 2 All E.R. 495, followed in *R.* v. *Collins* (1950) 34 Cr.App.R. 146, the court considered that it had a wider discretion since it was exercising the powers of the Home Secretary. Arguments can be put forward for both constructions of section 19 (*a*), particularly as section 19 (*b*) provides that the Home Secretary may refer a particular point in a case to the Court of Criminal Appeal for determination, but for practical reasons the more limited interpretation is preferable.

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[5] For the appellant: *Eric Myers* (instructed by Cohen & Cohen). For the Crown: *Sir Reginald Manningham-Buller Q.C., A.-G., J. C. Phipps* (instructed by the Director of Public Prosecutions).

See Archbold, 33rd ed., 335.

**Evidence**—*Corroboration—evidence of child*

R. *v.* CAMPBELL[6] (Court of Criminal Appeal: Lord Goddard C.J., Cassels and Donovan JJ.: April 30, 1956) ([1956] 3 W.L.R. 219; [1956] 2 All E.R. 272).

C. was convicted at Middlesex Quarter Sessions of seven offences of indecently assaulting boys under the age of sixteen years. C. was a schoolmaster and the case against him was that, on various occasions, he sat beside the boys while they were doing their lessons and felt their private parts. The court allowed the boys to be sworn, and the evidence relied on by the prosecution as corroboration was two-fold: in some cases a boy named as the assaulted person in a count gave evidence that he saw C. commit a similar or substantially similar act to that of which he complained on another boy named in another count. In four cases there was evidence of two boys and one girl who were not involved in any of the charges that they had seen C. act in relation to some of the boys in a manner which was alleged to constitute an indecent assault. The chairman in summing up stressed more than once how important it was that there should be corroboration of the evidence of young boys and gave a strong warning on the subject, at the same time telling the jury that if they fully appreciated the danger of convicting on the uncorroborated evidence of a child they could convict if absolutely certain that they were right in doing so. The jury were specifically directed that they must consider each case separately. Upon that summing-up, the jury convicted on all counts. The chairman thereupon gave a certificate for appeal on the question whether the evidence of children other than those with regard to whom offences were being alleged could afford corroboration of the evidence of complaining children (that question having been specifically left open in *R.* v. *Mitchell* (1952) 36 Cr. App.R. 79) and whether the summing-up with regard to that evidence was adequate and proper. C. appealed to the Court of Criminal Appeal against his conviction on the main ground that, as courts had always warned juries of the danger of convicting on the uncorroborated evidence of a child, the evidence of such a child could not amount to corroboration unless his or her evidence was also corroborated.

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[6] For the appellant: *F. H. Lawton* (instructed by H. R. Hodder & Son). For the Crown: *Michael Havers* (instructed by the Director of Public Prosecutions).

*Held,* dismissing the appeal, that if the appellant's argument were accepted, it would follow that a child's evidence would never corroborate, for if the evidence of the corroborating child had in turn to be corroborated by a person of more mature years, it would follow that it would be the latter's evidence that afforded the corroboration. For present purposes child witnesses could be divided into two classes, those who were sworn and those who were not sworn. The unsworn evidence of a child of tender years was required by section 38 of the Children and Young Persons Act, 1933, to be corroborated by some other evidence, and the court could see no reason why the corroboration should not be the evidence of another child who was capable of being sworn. Accordingly, when a child gave sworn evidence, which was not required by statute to be corroborated, there was no reason why the corroboration should not be that of another child. As each count in an indictment was equivalent to a separate indictment, it made no difference whether the child called to corroborate the evidence of another was alleged to be the victim in another count of the indictment or not. Thus, the unsworn evidence of a child had to be corroborated by sworn evidence (*R.* v. *Manser* (1934) 25 Cr.App.R. 18); the sworn evidence of a child did not need as a matter of law to be corroborated, but the jury should be warned that there was a risk in acting on the uncorroborated evidence of young boys and girls, though they might do so if convinced that the witness was telling the truth. It followed that the evidence of an unsworn child could amount to corroboration of sworn evidence, though a particularly careful warning should be given in that case. As the proper warnings were given in the present case, the appeal would be dismissed. [H. P.]

COMMENTARY. The Court of Criminal Appeal endeavoured in this case to deal comprehensively with the evidence of children. The case of *R.* v. *Manser,* in which a man was charged with carnal knowledge of a girl under the age of thirteen, causes some difficulty. The only corroboration offered of the child complainant's evidence was the unsworn evidence of another child and this was held not to be sufficient in law. It is not made clear, however, in the report whether the complainant's evidence was sworn or unsworn; if it was sworn that decision is overruled by the present case, if it was unsworn then there is no contradiction between the two decisions.

An infant may be sworn as a witness in any criminal case, provided that he appears sufficiently to understand the nature and moral obligation of an oath, his competency depending on his understanding: *R.* v. *Williams* (1836) 7 C. & P. 320. Corroboration, whether sought in accordance with a rule of practice at common law or required by statute, is " independent testimony which affects the accused by connecting or tending to connect him with the crime . . . it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed but also that the prisoner committed it ": *R.* v. *Baskerville* [1916] 2 K.B. 658 at 667.

See Archbold, 33rd ed., 477.

### **Factories**—*Breach of regulations—criminal liability—" persons employed "*

MASSEY-HARRIS-FERGUSON (MANUFACTURING) *v.* PIPER [7] (Q.B. Divisional Court: Lord Goddard C.J., Streatfeild and Donovan JJ.: June 6, 1956) ([1956] 3 W.L.R. 271; [1956] 2 All E.R. 722).

In a bay of a factory there were exposed trolley wires, some 20 feet above the floor, which supplied electrical power to an overhead travelling crane. Painting of the wall and the crane-work was being carried out by a firm of independent contractors. One of the painters employed by the contractors, having been told that the power was switched off, climbed up a ladder near the wires, came into contact with them and was electrocuted. The cause of the accident was the use of the wrong switch controlling the electrical power. On an information under section 60 of the Factories Act, 1937, and the electricity regulations made thereunder against the occupiers of the factory, it was contended on their behalf that the proper construction of the word " danger " in regulation 1 of the Generation, etc., and Use of Electrical Energy Regulations, 1908, was danger to persons employed by the occupier of the factory and that there was no evidence of such danger.

*Held,* applying *Smith* v. *Cammell Laird & Co.* [1940] A.C. 242 and *Mulready* v. *J. H. & W. Bell, Ltd.* [1953] 2 Q.B. 117, and distinguishing *Hartley* v. *Mayoh & Co.* [1954] 1 Q.B. 383 and *Stanton Ironworks Co.* v. *Skipper* [1956] Crim.L.R. 51, that the words "persons employed" in section 60 included not only the servants of the occupier of the factory but any other person who might be called on to do work in the factory; the test is whether a person is employed in a factory, not whether he is employed by the occupier. Accordingly, the occupiers were in breach of the regulations. [J. D. P.]

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[7] For the defendants: *Douglas Naylor* (instructed by Gibson & Weldon for John Whittle, Robinson & Bailey, Manchester). For the prosecutor: *S. B. R. Cooke* (instructed by Solicitor, Ministry of Labour and National Service).

COMMENTARY. *Stanton Ironworks Co.* v. *Skipper* was similar to the present case in that it concerned criminal liability for a contravention of the Factories Act, 1937. A locomotive was used in a factory in breach of a regulation and a man who was not an employee was killed. It was held that the regulation was broken in that the company had not guarded against danger to their employees and since a person had been killed the company were liable to a penalty. In our commentary to that case we remarked: "The point of importance in this case is that the company were criminally liable irrespective of whether the person killed was employed by the company or not. Indeed the decision of the Divisional Court was given on the assumption that the company did not owe a duty under the regulation towards a person not employed by them. This was in accordance with *Hartley* v. *Mayoh & Co.* [1954] 1 Q.B. 383, where it was held that civil liability for breach of a statutory regulation passed for the benefit of servants could not be placed upon occupiers of a factory in respect of a person not employed by them." From the present decision it seems that this is too wide an interpretation to be given to *Hartley* v. *Mayoh & Co.* In that case it was held that a fireman employed by a local authority, which maintained the fire brigade, who was called in an emergency to a fire at a factory was not a "person employed" within section 60 of the Act of 1937. The case may be distinguished from the previous civil cases, *Smith* v. *Cammell Laird & Co.* and *Mulready* v. *J. H. & W. Bell*, in which the words "persons employed" were not limited to persons employed by the factory occupier or owner, but were interpreted to include men doing work in the factory who were employed by other persons. The fireman was called in to deal with a particular emergency and he was not employed in the factory. Lord Goddard C.J. compared him to the policeman called in to quell a disturbance or to arrest a thief. The authority of *Stanton Ironworks Co.* v. *Skipper* is unaffected, since in that case the question whether the person killed was a person employed by the defendants did not arise.

**Food and Drugs**—*Meat—"butchers' meat"—joint of oxtail*

TAYLOR *v.* R. GUNNER [8] (Q.B. Divisional Court: Lord Goddard C.J., Streatfeild and Donovan JJ.: June 5, 1956) (*The Times*, June 6, 1956).

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[8] For the prosecutor: *Paul Wrightson* (instructed by J. G. Barr). For the defendants: *Neil Lawson Q.C., C. T. Salkeld-Green* (instructed by Hamilton-Hill & Partners).

The defendants had a joint of oxtail displayed for sale in their shop window to which was attached a ticket stating: "This joint price 4s. 10d. This joint will be re-weighed at the time of purchase." The ticket contained no indication of the weight or price per pound. A customer selected the joint which was wrapped up and handed to the cashier, who received 4s. 10d. from the customer. At no time was the joint weighed in the presence of the customer nor was she informed of its weight or price per pound. On an information under section 5 of the Sale of Food (Weights and Measures) Act, 1926, charging the defendants with selling butchers' meat otherwise than by net weight, it was contended that oxtail was not butchers' meat within the meaning of section 13 of the Act. The magistrate, being of opinion that there was some doubt as to the meaning of "butchers' meat," dismissed the information. On appeal by the prosecutor:—

*Held,* allowing the appeal, that oxtail was beef and not being excluded from the definition of "butchers' meat" in section 13 was included in that term and should have been sold by net weight. [J. D. P.]

COMMENTARY. In section 13 of the Sale of Food (Weights and Measures) Act, 1926, butchers' meat is defined as "beef, mutton, veal, lamb or pork, whether fresh, chilled, frozen or salted, and includes livers, but does not include heads, feet, hearts, lights, kidneys or sweetbreads, bacon, ham, pressed beef or any meat so treated as to be fit for human consumption without further preparation or cooking." The decision in the present case rests on the interpretation of this section.

See Stone, 88th ed., 2416.

### **Food and Drugs**—*Prosecution of offences—offences committed before coming into operation of Food and Drugs Act, 1955*

SMITH *v.* RUSKINGTON FOODS[9] (Q.B. Divisional Court: Lord Goddard C.J., Ormerod and Donovan JJ.: June 27, 1956).

The prosecutor preferred two informations against the defendants on January 9, 1956, in respect of offences which were alleged to have been committed on December 13, 1955, contrary to the provisions of the Food and Drugs Act, 1955. At the hearing of the informations before the magistrates, objection was made, on behalf of the defendants, to the summonses which had been issued pursuant to the informations. It was contended that if any offence had been committed it had been committed whilst the Food and Drugs Act, 1938, was in force, and that although the Act of 1955 had repealed the Act of 1938, on January 1, 1956, the informations should by virtue of the Twelfth Schedule to the Act of 1955, and the Interpretation Act of 1889, have been laid under the Act of 1938. It was further contended that the Act of 1955 was not retroactive and the defendants could not, therefore, have committed an offence under that Act before the date on which it came into force. The prosecutor contended that as the informations were laid after January 1, 1956, by virtue of the provisions of paragraph 4 (*a*) of the Twelfth Schedule to the Act of 1955, the informations had been properly laid and the summonses properly issued. The magistrates being of opinion that the informations were improperly laid, and that they should have been laid under the Act of 1938, dismissed the informations. The prosecutor appealed. The contentions made before the Divisional Court were the same as those made before the magistrates.

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[9] For the appellant: *Paul Wrightson* (instructed by Sharpe, Pritchard & Co., for J. H. Smith, Lincoln). For the respondent: *W. M. F. Hudson* (instructed by Cunliffe & Airy).

*Held*, dismissing the appeal, that section 38 (2) (*d*) of the Interpretation Act, 1889, provided that an offence must be prosecuted under the Act in force at the time of the commission of the offence. In the present case the respondents had offended against the Food and Drugs Act, 1938, and the informations should have been laid under that Act.

[D. Trafford Owen, *Barrister-at-Law*.]

COMMENTARY. There is a presumption that Acts of Parliament do not have retroactive effect. In a case such as the present, where the repealing Act merely consolidates previous enactments, it may seem that a prosecution should not fail because the information is laid under the wrong Act, but there are sound reasons for the general rule which gives the law a necessary certainty. The transitional provisions of Schedule 12 of the Food and Drugs Act, 1955, concern the continuance of effect of regulations, by-laws, declarations, requirements, etc., and not the prosecution of offences. In *Meek* v. *Powell* [1952] 1 K.B. 164 a defendant was convicted on two informations charging him with unlawfully selling in May, 1951, milk for human consumption which contained added water, contrary to section 24 of the Food and Drugs Act, 1938. That section had been repealed and re-enacted in section 9 of the Food and Drugs (Milk, Dairies and Artificial Cream) Act, 1950, which came into force on January 1, 1951, and it was held that the informations were bad. Byrne J. said that in such circumstances there were three courses open to the justices: they could amend the summons if the defendant did not object, or they could adjourn the case so that the summons might be amended, or they could dismiss the summons leaving it to the prosecution to charge the offence under the correct statute in a fresh summons.

### **Food and Drugs**—*Unfit for human consumption—rodent excreta in bottle of milk*

Merton and Morden Urban District Council v. United Dairies (London), Ltd.[10] (Wimbledon Magistrates' Court: G. A. Shrive, Esq., Chairman: May 18, 1956).

The defendant company was charged with selling to the Surrey County Council food, namely milk, intended for but unfit for human consumption, in that a third of a pint milk bottle delivered to the Raynes Park County Grammar School contained rodent excreta adhering to the inside of the bottle, contrary to section 8 of the Food and Drugs Act, 1955. Evidence was given that the defendant company was under contract with the Surrey County Council to supply certain schools with milk. Milk was delivered in crates to the County Grammar School by the company, which crates were collected by the school prefects, counted, and taken by the monitors to the forms. One boy pierced a hole in the tinfoil cap of a bottle and started to drink when another boy noticed what appeared to be black pieces in the milk. The milk was emptied from the bottle and the pieces were later examined by the public analyst who gave evidence that he formed the opinion that the pellets were rodent excreta and that bacteria were present. The company denied that the extraneous matter in the milk was rodent excreta and that the bottle had been delivered in that condition. Evidence was given as to the process of bottle washing and that any such extraneous matter would have been removed when washed in the machine used for washing and bottling.

The justices found the case proved and fined the company £20 and ordered them to pay £8 11s. costs.

[Leslie A. Owen, *Clerk to the Justices*.]

Commentary. What renders food unfit for human consumption has been the subject of some debatable decisions in the Divisional Court recently: see *J. Miller* v. *Battersea Borough Council* and *Turner & Son* v. *Owen* [1955] Crim.L.R. 779; *Chibnall's Bakeries* v. *Cope-Brown* [1956] Crim.L.R. 263. There is common ground between the latter case and the present in that in both cases the foreign matter contained in food was toxic. In *Chibnall's Bakeries* a used and dirty bandage was found adhering to the crust of a loaf and it was held that this rendered the loaf unfit for human consumption.

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[10] For the prosecution: Geoffrey Croasdell, Deputy Clerk for the Merton and Morden Urban District Council. For the defendant company: P. S. Gilmore, Solicitor.

### **Grievous Bodily Harm**—*Intermittent insanity—defendant's refusal to plead insanity—sentence*

R. *v.* Barnett[11] (Court of Criminal Appeal: Lord Goddard C.J., Ormerod and Donovan JJ.: June 25, 1956) (*The Times*, June 26, 1956).

B. was sentenced to ten years' imprisonment at Hereford Assizes for causing grievous bodily harm. The facts were that B. walked up to a man and a woman with a baby, who were waiting at a bus stop. For no apparent reason, he assaulted the man and the woman and threw the baby over a wall. At the trial, B. refused to set up a plea of insanity. On application to the Court of Criminal Appeal for leave to appeal against sentence:—

*Held,* dismissing the application, that, in imposing a long sentence, the trial judge had done the only possible thing, and this court could not interfere. It was known that B. was insane at times but, although his counsel and the judge had tried to reason with him, he absolutely refused to set up a plea of insanity because he did not want to be sent to Broadmoor. B. was a paranoic schizophrenic and at times was quite sane. He was sane at the time of the trial. On what lines the Secretary of State might see fit to advise Her Majesty was a matter for him, and it might be that B. would be certified insane. This court could not, in the circumstances, interfere. [H. P.]

Commentary. Insanity is usually regarded as a matter of protection of the accused and not protection of the public which is the real matter at issue in the present case. Insanity is usually pleaded in mitigation, to negative *mens rea,* most often in cases of murder and is regarded in English law as a matter of defence, the onus of proving it lying on the defence: *R.* v. *Smith* (1910) 6 Cr.App.R. 19.

The maximum penalty for grievous bodily harm is imprisonment for life: Offences against the Person Act, 1861, s. 18. Since the Home Secretary may at any time he thinks fit release on licence a person serving a term of imprisonment for life subject to such conditions as the former may determine (Prison Act, 1952, s. 27 (1)), it seems that, in circumstances such as the present, life imprisonment could usefully have been the sentence imposed. In *R.* v. *Grantham* [1955] Crim.L.R. 386 a sentence of life imprisonment was substituted for one of fifteen years' imprisonment imposed on a youth of nineteen convicted of shooting with intent to murder. The Court of Criminal Appeal emphasised that this was done out of mercy to the accused.

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[11] The applicant did not appear and was not represented. The Crown was not represented.

**Highways**—*Obstruction—evidence of public right of way*

BAXTER *v.* MIDDLESEX COUNTY COUNCIL [12] (Q.B. Divisional Court: Lord Goddard C.J., Ormerod and Donovan JJ.: June 21, 1956).

The appellant was the lessee of premises between which and the main carriageway and paved footpath was a forecourt some 48 ft. deep. The appellant used the premises for a second-hand car business and displayed cars on the forecourt. On an information under section 72 of the Highway Act, 1835, charging the appellant with wilfully obstructing the free passage of the highway, the justices found that the forecourt could not be of service to the public except for occasional persons who might want to go diagonally across it to or from the premises on either side, but that the appellant's use of the forecourt would cause obstruction to those persons. Prior to the appellant's tenancy the premises had been used for many years as a café and the forecourt had frequently been used by persons resorting to the café to park their lorries. The appellant did not produce the title deeds to the property and there was no evidence that the forecourt was included in the freehold. Two ordnance survey maps dated 1895 and 1935 were produced which indicated that the forecourt was not enclosed or distinguished from the highway. The justices were satisfied that the appellant had no title to the forecourt and that there had been a dedication to the public since 1895, that the forecourt formed part of the highway and that its obstruction had been unreasonable.

*Held,* allowing the appeal, that before finding that an offence had been committed it was necessary to establish that there was a public right of way over the forecourt thereby making it part of the highway. The only evidence before the justices was that of the ordnance maps, which were no evidence in themselves of a right of way, and evidence that occasional persons crossed the forecourt by an undefined route. The finding that the forecourt had previously been used for the parking of lorries was inconsistent with it being a highway. The justices had been misled by going into the question of title which was wholly irrelevant. In any event it was clear from section 62 of the Law of Property Act, 1925, that the forecourt was appurtenant to the premises.

*Per* Ormerod J. The evidence that persons occasionally used the forecourt went no further than to establish a general right to stray. [J. D. P.]

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[12] For the appellants: *J. G. Strangman Q.C., P. R. Oliver* (instructed by Lesser & Co.). For the respondents: *Michael Havers* (instructed by Solicitor to Middlesex County Council).

COMMENTARY. A highway may exist by prescription, under statute or by dedication to the public by the owner. Dedication is a matter of intention. Matters to be considered in deciding whether a highway has been dedicated are user by the public, the length of such user, the nature of the place itself, and the extent of the landowner's acquiescence (see Halsbury's *Laws of England*, Hailsham edition, Vol. 16, pp. 217 *et seq.*). Ordnance maps are not evidence on questions whether a road is public or private: *Att.-Gen.* v. *Antrobus* [1905] 2 Ch. 188, 203. Section 62 of the Law of Property Act, 1925, provides: " A conveyance of land having houses or other buildings thereon, shall be deemed to include . . . courts, court yards . . . appertaining or reputed to appertain to the land . . . conveyed. . . ."

In our editorial comment earlier this year (see [1956] Crim.L.R. 147) we considered a case in which the question arose as to whether a car dealer's forecourt was a " public place " within the meaning of section 15 of the Road Traffic Act, 1930. It appeared that during business hours it was but not at other times.

**Indictment**—*Conspiracy*. See R. *v*. OWEN, p. 550, above.

**Insanity**—*Grievous bodily harm*. See R. *v*. BARNETT, p. 560, above

**London**—*Street trading—trading from a stationary pitch*

QUIGLEY *v*. CRAVEN [13] (Q.B. Divisional Court: Lord Goddard C.J., Ormerod and Donovan JJ.: June 26, 1956).

On December 12, 1955, the appellant sold goods from a tricycle at a stationary pitch in a part of a street in Westminster which was a restricted street within the London Traffic (Miscellaneous Provisions) Regulations, 1951. He was not himself licensed to engage in street trading or registered as a street trader but his son, whom he assisted, was a registered street trader under section 19 of the London County Council (General Powers) Act, 1947, and was authorised by a certificate from the Westminster City Council pursuant to that Act to trade " in any street in Westminster." Other than that certificate the appellant's son had no licence to trade from a stationary pitch in the street in question or elsewhere. The appellant was charged with an offence under regulation 2 of the 1951 regulations and was convicted, the magistrate being of the opinion that the certificate held by his son did not authorise trading from a stationary pitch. He fined the appellant one shilling. On appeal:—

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[13] For the appellant: *Jonathan Sofer* (instructed by Henry Mossop & Syms). For the prosecutor: *Paul Wrightson* (instructed by Solicitor, Metropolitan Police).

*Held,* that the certificate held by the appellant's son as a registered street trader allowed him to perambulate the streets and was not a licence enabling him to sell goods from a stationary pitch, and that as neither the appellant nor his son held a licence as required by regulation 2 of the 1951 regulations the appellant was properly convicted.

[Mrs. E. M. Wellwood, *Barrister-at-Law.*]

**Magistrates**—*Wrongful imprisonment—remand for medical report*

BOAKS *v.* REECE [14] (Queen's Bench Division: Pilcher J. and a jury: June 13, 1956) ([1956] 1 W.L.R. 886; [1956] 2 All E.R. 750).

B. was convicted before a magistrate on charges under section 72 of the Highway Act, 1835, and the Motor Vehicles (Construction and Use) Regulations, 1955, and was remanded in custody for seven days for a medical report. He was then given a conditional discharge. In an action by B. against the magistrate for wrongful imprisonment, B. contended that none of the offences of which he was convicted carried a sentence of imprisonment and that he was remanded under section 26 of the Criminal Justice Act, 1948. The magistrate denied that the remand was under section 26 but alleged that it was under section 14 (3) of the Magistrates' Courts Act, 1952. The jury found that although, when B. was remanded, no particular section of the Magistrates' Courts Act, 1952, was mentioned, when B. signed the committal warrant, section 14 (3) was written on the document. They further found that, in making the order, the magistrate was not acting vindictively.

*Held,* giving judgment for the magistrate, that, being satisfied, as he was, that inquiries into B.'s mental condition should be made, the magistrate had power under section 14 (3) of the Act of 1952 to make an order remanding B. in custody. [J. D. P.]

COMMENTARY. Lt.-Commander Boaks has for some time past conducted his own private campaign for road safety which has involved his appearance in front of Mr. Reece before. The imposition of fines of £2 or £3 has had no effect and in his defence in the present case Mr. Reece said that he wanted to be assured that the plaintiff's actions were really deliberate, in the sense that he was in full possession of his reasonable faculties, before he imposed a harsher fine (see *The Times,* June 14, 1956).

Sections 14 (3) and 26 (1) of the Magistrates' Courts Act, 1952, replace sections 25 (1) and 26 (1), respectively, of the Criminal Justice

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[14] The plaintiff appeared in person. For the magistrate: *H. J. Phillimore Q.C., Rodger Winn* (instructed by Treasury Solicitor).

Act, 1948. In both cases section 26 (1) gives a magistrates' court power to remand in custody a person charged with an offence punishable on summary conviction with imprisonment for inquiry into his physical or mental condition. In the Criminal Justice Act, 1948, the power was expressly declared to be without prejudice to the court's power under section 25 (1) to remand a person for "the purpose of enabling inquiries to be made or of determining the most suitable method of dealing with his case." There is no such declaration in section 26 (1) of the Magistrates' Courts Act, 1952, but since this is a consolidating Act it is presumed that the law is not altered, and there seems no reason for limiting the inquiries which may be made under section 14 (3) to those which are not of a medical character or into the physical or mental health of the accused.

See Stone, 88th ed., 50, 60.

**Merchandise Marks**—*False trade description—negligent delivery of short weight of coke*

SEARS *v.* SOUTH WESTERN GAS BOARD [15] (Q.B. Divisional Court: Lord Goddard C.J., Streatfeild and Donovan JJ.: June 6, 1956).

H. ordered from the South Western Gas Board 10 cwt. of coke and the weighbridge clerk made out a delivery note for that amount and handed it, with a number of others, to the roundsman. The roundsman, contrary to the standing instructions of the Board, did not check the quantities to be delivered against the delivery notes, but loaded his lorry with his normal load in 1 cwt. bags. He handed the delivery note to H., without reading it, but delivered only 5 cwt. of coke. Informations were preferred by an inspector of weights and measures against the Board, alleging an offence under section 2 (2) of the Merchandise Marks Act, 1887, in delivering goods to which a false trade description had been applied and against the roundsman, alleging that he aided and abetted the Board in the commission of the offence. The justices dismissed the information, upholding the Board's contention that they had acted innocently within the meaning of section 2 (2) (*b*) of the Act. On appeal by the inspector of weights and measures:—

*Held,* allowing the appeal, that it was immaterial whether the seller believed that he was applying a false trade description to the goods or not. The Act was for the protection of the public and the only defence available to a seller under section 2 (2) (*b*) was that he had acted with inadvertence or by mistake. If he intended to do the act which the statute forbade, he was guilty of an offence. The roundsman intended to deliver 5 cwt. of coke and intended to deliver the delivery note for 10 cwt., although he did not know, through negligence, that the description was false. The Board was vicariously liable for the acts of the roundsman and the case must be remitted to the justices with the intimation that the offence was proved.

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[15] For the appellant: *John Stephenson* (instructed by Collyer-Bristow & Co. for P. A. Selborne Stringer, Trowbridge). For the Board: *John Megaw Q.C., J. F. Donaldson* (instructed by Lemon, Humphreys, Parker & Mather, Swindon).

[Mrs. E. M. Wellwood, *Barrister-at-Law.*]

COMMENTARY. Section 2 (2) of the Merchandise Marks Act, 1887, provides two defences to a charge of applying a false trade description to goods: (*a*) that the defendant had taken all reasonable precautions against committing an offence, had no reason to suspect the genuineness of the description, and on the prosecutor's demand had given all the information in his power with respect to the persons from whom he had obtained the goods; (*b*) that " otherwise he had acted innocently." As was pointed out in *Slatcher* v. *George Mence Smith* [1951] 2 K.B. 631 if section 2 (2) (*b*) were to be interpreted as meaning that the defendant acted bona fide and had taken all reasonable precautions against committing an offence this would render section 2 (2) (*a*) unnecessary. It was held in that case that the words " otherwise he had acted innocently " should be interpreted as meaning " that he had acted inadvertently or under some mistake of fact." Under section 2 (2) a master is vicariously liable for the acts of his servants: *Coppen* v. *Moore* (*No.* 2) [1898] 2 Q.B. 306; *Mear* v. *Baker* [1954] Crim.L.R. 719. The Board could not avail themselves of the defence contained in section 2 (2) (*a*) because the offence with which they were charged was the offence of the roundsman who had not taken all reasonable precautions against committing an offence.

Unless applied by a local Act, section 21 (2) of the Weights and Measures Act, 1889, which imposes a fine for delivering a smaller quantity of coal than that specified in a delivery ticket, does not affect deliveries of coke: see *Fletcher* v. *Fields* [1891] 1 Q.B. 790.

See Archbold, 33rd ed., 1351; Stone, 88th ed., 1600.

### **Obtaining Credit by Fraud**—*Liability to render services in future—" money's worth "*

R. *v.* INGRAM [16] (Court of Criminal Appeal: Lord Goddard C.J., Streatfeild and Donovan JJ.: June 8, 1956) ([1956] 3 W.L.R. 309; [1956] 2 All E.R. 639).

The defendant was convicted at Middlesex Quarter Sessions of six offences of obtaining credit by fraud and sentenced to nine months' imprisonment. The fraud alleged against him was that he obtained contracts from a number of shopkeepers to erect or renovate electric neon signs at an agreed price. He obtained payment of part of that price in advance, but did not do the work save for insignificant matters of a preparatory nature and the advance payments were not returned. The jury were directed that they had to be satisfied that, at the time of obtaining these advance payments, he never had any intention of carrying out the stipulated work. The defendant appealed to the Court of Criminal Appeal against his conviction, on the ground that, although his conduct was fraudulent, there was no obtaining of credit and, therefore, there was no offence under section 13 (1) of the Debtors Act, 1869. It was contended that receiving payments in advance was not " obtaining credit "; in order to " obtain credit " it was necessary to incur an obligation to pay money in the future and it was not sufficient to incur an obligation to do work in the future.

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[16] For the appellant: *C. W. R. Pickthorn* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *J. H. Buzzard* (instructed by the Solicitor, Metropolitan Police).

*Held,* dismissing the appeal, that the offence under section 13 (1) was constituted by the offender, in incurring any debt or liability, obtaining credit by fraud. The word " liability " was defined by section 3 of the Debtors Act, 1869, and section 31 of the Bankruptcy Act, 1869. It was expressed to include any compensation for work or labour done and any obligation or possibility of obligation to pay money or money's worth on a breach of contract; and generally " any express or implied engagement, agreement, or undertaking, to pay, or capable of resulting in the payment of, money or money's worth; whether such payment is, as respects amount, fixed or unliquidated; as respects time, present or future, certain or dependent on any one contingency or on two or more contingencies. . . ." That definition was preserved for the purposes of the Debtors Act, 1869, by sections 150 (2) and 30 of the Bankruptcy Act, 1914. It was erroneous to argue that credit could only be obtained within the meaning of section 13 if the debt or liability incurred was to pay money alone. That argument entirely ignored the expression " money's worth " in the statutory definition of the word " liability." In the present case, the liability incurred by the defendant was to render money's worth, *i.e.,* services in the near future, to the customer who paid him money. It was clear that he received credit, and did so in incurring a " liability." Since he obtained such credit by fraud, the offence under section 13 was complete.

*Per curiam*: The present case was, on the evidence, a clear case of fraud. Mere delay in paying a debt or doing work, however, is not a criminal offence, and courts who try these cases will no doubt be on their guard against any attempt to abuse the section by bringing proceedings under it where there is no real evidence of fraud, but merely of procrastination. The court's power to award costs against a prosecutor might usefully be borne in mind in this connection. [H. P.]

COMMENTARY. To constitute an offence under section 13 (1) of the Debtors Act, 1869, there must be (1) the incurring of a debt or liability; (2) an obtaining of credit; and (3) fraud. It is difficult to separate the first two elements. In *R.* v. *Mitchell* [1955] Crim.L.R. 246 it was held that " to obtain credit under the Debtors Act, there must be the creation of a debt "; now this should read " debt or liability." In *Osborn* v. *Barton* (1950) 66 T.L.R. (Pt. 1) 115, which concerned the obtaining of credit by an undischarged bankrupt, Lord Goddard C.J. defined obtaining credit as " obtaining something on a promise to do something in the future." This would cover the defendant's acts in the present case, but in *R.* v. *Laker* (1949) 34 Cr.App.R. 36 it was held that there had been no obtaining of credit where the defendant agreed to obtain a generating engine, asked for a cheque to cover its cost and failed either to produce the engine or repay the money. The facts of the present case are similar to those in *R.* v. *Dent* [1955] Crim.L.R. 501. In that case the defendant carried on business as a pest destroyer and contracted with farmers to destroy vermin on their land. He asked for payments in advance which he was given but no work was in fact done. He was convicted of obtaining cheques by false pretences, but the conviction was quashed by the Court of Criminal Appeal because a statement of intention about future conduct does not amount to a false pretence in criminal law. Dishonesty in itself is not a criminal offence but the present decision means that there is a remedy available in circumstances where after the decision in *R.* v. *Dent* it was probably thought none existed.

See Archbold, 33rd ed., 1346, 1347.

### **Police**—*Wages paid to injured policeman—recovery from corporation liable for injury*

METROPOLITAN POLICE DISTRICT RECEIVER *v.* CROYDON CORPORATION[17] (Queen's Bench Division: Slade J.: June 11, 1956) ([1956] 2 All E.R. 785).

B., a police constable in the Metropolitan Police, was injured as a result of the negligence of a lorry driver employed by the defendant corporation, and was incapacitated for seven months. During this period he was paid his full wages by the receiver, amounting to £104. The corporation had paid £2,513 in full satisfaction of a claim brought by B. in the High Court in respect of his injuries, but he had made no claim for loss of wages in this action. In an action by the receiver against the corporation to recover the wages paid to B.:—

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[17] For the receiver: *Gerald Gardiner Q.C., Patrick O'Connor* (instructed by Ponsford & Devenish, Tivendale & Munday). For the corporation: *Montague Berryman Q.C., Humfrey Edmunds* (instructed by Herbert Smith & Co.).

*Held,* that the receiver was legally bound to pay the £104 to B.; that the action was based on quasi-contract and the corporation's failure to recoup the receiver for the amount paid to B. would constitute an unjust benefit to the corporation at the expense of the receiver; accordingly, the receiver was entitled to recover the amount from the corporation. [J. D. P.]

COMMENTARY. The importance of this case lies in the fact that in the Metropolitan Police area alone there are some seventy claims pending by the receiver, who has paid wages to injured police constables whose incapacity has been caused by the alleged negligence of drivers of motor-vehicles. The action was a test action brought to decide whether or not the decision of Atkinson J. in *Receiver for the Metropolitan Police District* v. *Tatum* [1948] 2 K.B. 68 was correct. In that case it was held that the receiver was entitled to be indemnified by the defendant for hospital charges and pay and allowances paid during disablement to a police officer injured through the negligence of the defendant as the receiver was under a statutory duty to pay those moneys to the police officer (see section 12 of the Metropolitan Police Act, 1829). Some doubt appears to have been cast on this decision by *Att.-Gen. for New South Wales* v. *Perpetual Trustee Co.* [1955] Crim. L.R. 381, where it was held that a police constable was not a servant of the Crown but the holder of a public office, therefore the Crown could not recover for loss of his service in an action *per quod servitium amisit* against those responsible for injury incapacitating a policeman. Slade J. reached the same conclusion as Atkinson J. had done in *Tatum's* case although he preferred to give his own reasons. But in *Monmouthshire County Council* v. *Smith*, a case heard at Monmouthshire Assizes, Lynskey J. held that the plaintiffs could not recover sums paid by them to a policeman injured through the defendant's negligence. We hope to include a report of this case in the next issue of the *Review.* Decisions of the High Court are not absolutely binding on the High Court itself and one High Court judge may refuse to follow another, although such refusal is rare. A conflict of authority between High Court judges can only be settled by the Court of Appeal.

**Police**—*Wasting the time of the police—false message sent by telephone*

POLICE *v.* BROWN [18] (Coventry City Magistrates' Court: H. Buckley, Esq., Chairman: May 12, 1956).

The defendant pleaded guilty to a charge of sending a message by telephone which he knew to be false for the purpose of causing inconvenience to another person, contrary to section 66 of the Post Office Act, 1953. As a result of a ten-shilling bet with his friend the defendant falsely reported to the police the loss of a fictitious lorry. When asked the number of the lorry he quoted the number of a car which until recently had been a police car and when challenged changed to another number. The police circulated the information, but the defendant having collected his ten-shilling wager then telephoned again saying the missing lorry had been returned. He was interviewed and admitted what had happened:—

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[18] The defendant appeared in person.

*Held*, the defendant should be fined £5. He was ordered to pay costs.

[A. N. Murdoch, *Clerk to the Justices*.]

COMMENTARY. Before the decision in *R.* v. *Newland* [1954] Crim. L.R. 51, it is likely that in similar circumstances the defendant could have been charged on indictment with the common law misdemeanour of effecting a public mischief on the authority of *R.* v. *Manley* [1933] 1 K.B. 529. In *R.* v. *Newland*, however, the Court of Criminal Appeal held that public mischief should be regarded as part of the law of conspiracy and that the actions of individuals should be regarded as indictable only if they constitute what in the past has been held to be a common law or statutory offence. The present case indicates a simple method of dealing with persons making false statements to the police by telephone. The maximum penalties on summary conviction for this offence are a fine of £10 or one month's imprisonment or both.

To compare Northern Irish and Australian law see [1956] Crim.L.R. 161 and 437, and as to Scotland see *Gray* v. *Morrison*, 1954 S.L.T. 71.

### **Road Traffic**—*Insurance—driving away vehicle without owner's consent, but not driving while uninsured*

POLICE *v.* BISHOP[19] (Walsall Borough Magistrates' Court: W. R. Wheway, Esq., Chairman: May 11, 1956).

The defendant pleaded not guilty to charges of stealing a motor-cycle or, alternatively, of taking a motor-cycle away without the consent of the owner, and of using a motor-cycle without a certificate of insurance. The prosecution evidence was that the defendant was seen attempting to start a motor-cycle in a street. He kicked the starter several times and on each occasion the motor-cycle moved forward. He said to the police officer who investigated that it was his motor-cycle and that it would not start properly. When asked for his driving licence and insurance he failed to produce them and later said "I'm saying nothing." The machine moved about twelve feet in all. The next day the defendant produced a certificate of insurance which related to his own motor-cycle. It also covered a motor-cycle not his own for business, social and pleasure purposes so long as it was not hired to him. Evidence was given that the insurance company would regard itself as covering the defendant on this occasion. The defendant said he had no intention of stealing or taking away the motor-cycle, but he had a very great interest in motor-cycles and tried this one to get the feel of it:—

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[19] For the defendant: J. Sillitoe, Solicitor, Walsall.

*Held*, the defendant was covered by the insurance policy on this occasion. The charges of using a motor-cycle without a certificate of insurance and of stealing a motor-cycle were dismissed. The defendant was fined £10 for taking a motor-cycle away without the consent of the owner and ordered to pay 25s. costs.

[B. Price Francis, *Clerk to the Justices.*]

COMMENTARY. In MacGillivray on *Insurance Law*, 4th ed. at § 568, the general principle is stated that: " It is contrary to public policy for a man to insure against the consequences of his own deliberate act if such act constitutes . . . a criminal offence, and an exception to that effect must be read into every policy, even although contrary to its express terms." Cited in support of this proposition is *Beresford* v. *Royal Insurance Co.* [1938] A.C. 586, in which it was held that personal representatives of a man who insured his life and then committed suicide while sane could not recover on the policy although it expressly covered such a death. The present case may be distinguished, however, since the primary purpose of making it illegal to drive while uninsured is to protect third parties, and not the insured person himself; see the remarks of Lord Goddard C.J. in *Leggate* v. *Brown* [1950] 2 All E.R. 564 at 565. Although the ultimate test of whether an insurance policy is in force is whether the insurance company is in law liable to indemnify the user if damage and injury result from the use of a vehicle, where the insurance company say that they consider themselves on risk and the matter is arguable one way or the other, the court may accept the company's decision: *Carnill* v. *Rowland* [1953] 1 W.L.R. 380.

**Road Traffic**—*Speed limit—goods vehicle—Austin " pick-up " van*

BRYSON *v.* ROGERS [20] (Q.B. Divisional Court: Lord Goddard C.J., Ormerod and Donovan JJ.: June 27, 1956) (*The Times*, June 28, 1956).

An information was preferred against the defendant alleging that when driving an Austin " pick-up " van, for which he held a farmer's " F " licence, he drove at a greater speed than the maximum specified in the Road Traffic Act, 1930, for a goods vehicle of that type. At the time of the alleged offence no goods were being carried in the vehicle. The justices found that the vehicle was not fitted with a rigid roof, but were of opinion that the cases of *Blenkin* v. *Bell* [1952] 2 Q.B. 620 and *Woolley* v. *Moore* [1953] 1 Q.B. 43 applied and dismissed the information. On appeal the prosecutor contended that whether or not it was carrying goods the van was limited to a maximum speed of thirty miles per hour by reason of the Motor Vehicles (Variation of Speed Limit) Regulations, 1955:—

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[20] For the prosecutor: *Edward Gardner* (instructed by Sharpe, Pritchard & Co. for R. P. Tunstall, Maidstone). The defendant did not appear and was not represented.

*Held*, allowing the appeal, that on the finding of the justices the vehicle was not a dual-purpose vehicle and by reason of the Motor Vehicles (Variation of Speed Limit) Regulations, 1955, whether or not the vehicle was carrying goods its speed was limited to thirty miles an hour. [J. D. P.]

COMMENTARY. The Road Traffic Act, 1930, Sched. I, as substituted by the Act of 1934, imposes a speed limit on goods vehicles. The Motor Vehicles (Variation of Speed Limit) Regulations, 1950 (S.I. No. 1705), exempted from these speed limits certain goods vehicles not exceeding three tons in weight unladen other than those which were authorised to be used under carriers' licences or were specifically exempted from holding such a licence. These Regulations were repealed by the Regulations of 1955 (S.I. No. 1880; [1956] Crim.L.R. 137), and all goods vehicles are now subject to the speed limits. The Regulations of 1955 further provide that dual-purpose vehicles, as defined in the Regulations, shall be treated for the purpose of the speed limit as passenger vehicles. A shooting brake did not fall within the exemption from the speed limit provided by the Regulations of 1950, since it was authorised to be used as a goods vehicle under a carrier's licence, but in *Blenkin* v. *Bell* [1952] 2 Q.B. 620 it was held that it was not subject to a speed limit when it was not carrying goods; it did not then have to observe the conditions of the licence. This case was followed in *Woolley* v. *Moore* in relation to a Standard Vanguard motor-van. Such dual-purpose vehicles are now covered by the Regulations of 1955 in which the effect of these decisions is embodied. The present case, however, was decided on the simple point that the van in question was a goods van and no exemption now applies to such vehicles.

**Sentence**—*Corrective training—sentence of imprisonment substituted*

R. *v.* SMITH [21] (Court of Criminal Appeal: Streatfeild, Ormerod and Pearce JJ.: June 19, 1956).

S., who was twenty-one years of age, pleaded guilty at quarter sessions on January 5, 1956, to housebreaking with intent to commit a felony. S. was bound over to come up for judgment on March 23, 1956, and told that if he did not behave himself in the interval a sentence of imprisonment might be imposed. S. found employment and, whilst so employed, stole a pair of shoes belonging to a fellow workman. S. duly appeared at quarter sessions on March 23 and was sentenced to four years' corrective training. S. had four previous convictions for larceny but had never been to an approved school, Borstal or prison. On appeal to the Court of Criminal Appeal:—

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[21] The appellant appeared in person. The Crown was not represented.

*Held*, varying the sentence, that although this was a very mean offence and in defiance of the court, four years' corrective training was, in the circumstances, excessive. S. had never previously been sentenced to any kind of detention, but the court could not consider placing him on probation; he had been given a chance by quarter sessions and had abused it. At the same time the court were of opinion that even the minimum period of corrective training would be excessive for this offence, and accordingly, the sentence would be varied to one of eighteen months' imprisonment. [H. P.]

COMMENTARY. The statutory minimum sentence of corrective training is two years (Criminal Justice Act, 1948, s. 21 (1) ), but as a general rule three years should be considered as the minimum period (*R.* v. *Grant* [1951] 1 K.B. 500).

**Vagrancy**—*Loitering with intent—charge*

R. *v*. RUSSELL [22] (Lambeth Magistrates' Court: Geoffrey Rose, Esq., M.C.: April 12, 22, May 18, 1956).

The defendant was charged with "being a suspected person loitering in a public place at 451 Brixton Road, S.W.9, with intent to commit a felony therein, contrary to the Vagrancy Act, 1824, section 4." The words of the section are "Every suspected person or reputed thief frequenting . . . any place of public resort . . . with intent to commit felony" and the premises referred to were a branch of Woolworth's Stores:—

*Held*, dismissing the charge, that following the cases of *Re Jones* (1852) 7 Ex. 586 and *Re Timson* (1870) 5 L.R.Ex. 257 the words of the section must be strictly construed. The charge was bad in that it was not laid in the strict words of the statute. It was not necessary to decide whether or not a branch of Woolworth's Stores is a "place of public resort."

[R. B. Tarling, *Solicitor.*]

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[22] For the prosecution: D. W. Warran, Solicitor of Metropolitan Police. For the defendant: *James Mendl* (instructed by R. W. Platt).

COMMENTARY. In *Re Jones*, above, it was held that a committal that stated that a person did unlawfully frequent a certain street was bad because it did not state that the street led to some river, canal, etc., and it was considered that only such streets were covered by the section. This decision was followed in *Re Timson*.

Section 100 (1) of the Magistrates' Courts Act states that no objection shall be allowed to any information for any defect in it in substance or form. This extremely wide provision, however, cannot be construed literally; in the commentary to this section in Paley on *Summary Convictions*, 10th ed., p. 200, it is argued, for instance, that " it must be clear that a valid objection could be raised if it were shown that the requirements of sections 1 or 43 as to local jurisdiction or of section 104 as to limitation of time had not been complied with." Rule 77 of the Magistrates' Courts Rules provides that every information shall be sufficient if it describes the specific offence with which the accused is charged in ordinary language. The test of the sufficiency of an information is whether it contains such particulars as are necessary for giving the accused reasonable information about the nature of the charge: *Robertson* v. *Rosenberg* [1951] 1 T.L.R. 417. Section 100 (1) replaces an earlier provision contained in section 1 of the Summary Jurisdiction Act, 1848; there is no amendment in the law and no reason why *Re Jones* should cease to have effect. " Loitering," " frequenting," " public place " and " place of public resort " are all words with particular legal connotations and have been subject to judicial interpretation; on this ground the difference in wording might have been regarded as misleading.

# *Acts and Orders*

### Agriculture

For milk regulations, see p. 574, below.

### Civil Defence

TRANSFER OF FUNCTIONS (CIVIL DEFENCE) ORDER, 1956 (S.I. No. 825): operative July 1, 1956. The functions of the Minister of Health under the Civil Defence (Evacuation and Care of the Homeless) Regulations, 1949 (S.I. No. 2147) are transferred to the Minister of Housing and Local Government.

### Dangerous Drugs

DANGEROUS DRUGS ACT, 1951 (APPLICATION) ORDER, 1956 (S.I. No. 817): operative June 18, 1956. Part III of the Dangerous Drugs Act, 1951, now applies to 1:3 Dimethyl-4-phenyl-4-propionyloxyhexamethyleneimine, 3-Hydroxy-N-phenethylmorphinan, 4-Morpholino-2:2-diphenyl ethyl butyrate, 4-Dimethylamino-1:2-diphenyl-3-methyl-2-propionyloxybutane, their salts and any preparation, admixture, extract or other substance containing any proportion of them.

For penalties for offences, see section 15 of the Act of 1951.

### Food and Drugs

FOOD HYGIENE (AMENDMENT) (NO. 1) REGULATIONS, 1956 (S.I. No. 938): operative June 30, 1956. In relation to shrimps, prawns and onions the date of coming into operation of regulation 7 of the Regulations of 1955 (S.I. No. 1906; [1956] Crim.L.R. 133), is postponed to January 1, 1957. This regulation restricts the giving out of food for preparation or packing on or about domestic premises for the purpose of a food business and came into operation in relation to all other food on July 1, 1956.

For penalties for contraventions, see regulation 33 of the principal Regulations.

MILK AND DAIRIES (CHANNEL ISLANDS AND SOUTH DEVON MILK) REGULATIONS, 1956 (S.I. No. 919); MILK (GREAT BRITAIN) (AMENDMENT) ORDER, 1956 (S.I. No. 920): both operative July 1, 1956. All milk sold for human consumption or for use in the preparation of food for human consumption as Channel Islands, Jersey, Guernsey or South Devon milk must contain not less than four per centum by weight of milk fat. The penalties for contraventions of this provision are a maximum fine of £100 or imprisonment for a term not exceeding three months or both. Each food and drugs authority is responsible for its enforcement in their area. Section 113 of the Food and Drugs Act, 1955, which relates to a contravention due to some person other than the person charged, applies to contraventions of the Regulations. The Milk (Great Britain) Order, 1954 (S.I. No. 385) is amended as a consequence. As from July 1, 1956, the maximum price of milk on sale in Great Britain was increased by ½d. per pint.

See FOOD AND DRUGS (SCOTLAND) ACT, 1956 (APPOINTED DAY) ORDER, p. 575, below.

### London

The following Orders have been made detailing prescribed routes: S.I. 1956, Nos. 902 (Camberwell); 930 (Croydon); 949 (Dagenham).

The following Orders have been made prohibiting waiting: S.I. 1956, Nos. 807 (High Street, Dorking); 868 (Dartford).

The following Order has been made concerning parking places: S.I. 1956, No. 869 (the appointment of parking places in Foresters' Hall Place, Finsbury, Connaught Place, Paddington, and Oaklands Road, Bexley, is revoked; the limits of parking places in Stackhouse Street, Chelsea, Vernon Road, Leyton, Selborne Road, Walthamstow and High Street, Dorking are altered; new parking places are appointed in streets in Holborn, Lewisham, Leyton, Surbiton and Thurrock).

### Merchant Shipping

As to oil in navigable waters, see p. 576, below.

### Revenue

EXCHANGE CONTROL (AMENDMENT) ORDERS, 1956, AUTHORISED DEALERS (S.I. No. 870); AUTHORISED DEPOSITARIES (S.I. No. 871): both operative June 8, 1956. The list of banks and other persons authorised under the Exchange Control Act, 1947, to deal in gold and foreign currency and the list of authorised depositaries with whom under that Act certain securities are required to be deposited are amended.

For penalties for contraventions, see Schedule 5 of the Act of 1947.

### Road Traffic

MOTOR VEHICLES (AUTHORISATION OF SPECIAL TYPES) (AMENDMENT) ORDER, 1956 (S.I. No. 932): operative July 1, 1956. In Orders made under section 3 of the Road Traffic Act, 1930, authorising the use on roads of special types of motor-vehicles and trailers and in force on April 2, 1955, references to the Motor Vehicles (Construction and Use) Regulations, 1955, are substituted for references to the Motor Vehicles (Construction and Use) Regulations, 1951. The Regulations of 1955 (S.I. No. 482; [1955] Crim. L.R. 393) replaced those of 1951 with a number of amendments.

### Scotland

*Food and drugs*

FOOD AND DRUGS (SCOTLAND) ACT, 1956 (APPOINTED DAY) ORDER, 1956 (S.I. No. 955): made June 19, 1956. The Food and Drugs (Scotland) Act, 1956 ([1956] Crim.L.R. 357) comes into operation on August 1, 1956.

### Sea and Seashore

OIL IN NAVIGABLE WATERS ACT, 1955 (COMMENCEMENT) ORDER, 1956 (S.I. No. 896): made June 8, 1956. The provisions of the Oil in Navigable Waters Act, 1955 ([1955] Crim.L.R. 447) with the exception of section 2 (3), (4), which designate certain prohibited sea areas, come into operation on September 8, 1956.

OIL IN NAVIGABLE WATERS REGULATIONS, 1956, HEAVY DIESEL OIL (S.I. No. 897); EXCEPTIONS AND EXEMPTIONS (S.I. No. 898); OIL IN NAVIGABLE WATERS (PROHIBITED SEA AREAS) (PROTECTION OF UNITED KINGDOM COASTS) ORDER, 1956 (S.I. No. 899): all operative September 8, 1956. For the purposes of section 1 of the Oil in Navigable Waters Act, 1955 ([1955] Crim.L.R. 447) which makes it an offence to discharge certain oils in a prohibited sea area, heavy diesel oil is defined as marine diesel oil, other than those distillates of which more than half the volume distils at a temperature not exceeding 340 degrees Centigrade when tested by the A. S. T. M. (American Society for Testing Materials) Standard Method D. 158–54.

In certain cases ships are excepted from the operation of section 1 (1) of the Act of 1955. Every British ship registered in the United Kingdom is so excepted in respect of the discharge from its bilges of a mixture containing lubricating oil which has drained or leaked from machinery spaces but no other oil to which section 1 (1) applies. Until June 1, 1957, this provision has effect as though the reference to lubricating oil included a reference to oil fuel. Every British ship being a tanker registered in the United Kingdom is excepted from the operation of section 1 (1) in respect of the discharge of a mixture containing oil where the mixture consists only of oil and ballast water or water which has been used for cleaning cargo tanks, provided: (1) at the time of the discharge the ship is proceeding from a United Kingdom port or from a port within a prohibited sea area to another such port for the purpose either of loading oil or of undergoing repairs; (2) the port to which the ship is proceeding has not facilities adequate to receive the mixture or the oil residue therefrom without causing unreasonable delay to the ship; (3) the discharge is made more than fifty miles from the coast of Norway and more than 100 miles from the coast of the United Kingdom or of any other country which is contiguous with the prohibited sea area. Until the International Convention for the Prevention of Pollution of the Sea by Oil, 1954, comes into force, or until such earlier date as the Minister of Transport and Civil Aviation may determine, it will be sufficient for the discharge to be made as far as practicable from land and not to the landward of the seaward limits of the territorial waters of the United Kingdom if it is a discharge of a mixture of oil and ballast water from a ship of less than 2,500 tons gross tonnage, or a discharge of a mixture of oil and water which has been used for cleaning cargo tanks from a ship of less than 500 tons gross tonnage. A British ship registered in the United Kingdom, not being a tanker, which uses bunker fuel tanks for the carriage of ballast water is exempted from the operation of section 1 (1) of the Act of 1955, in respect of a discharge of a mixture containing oil where the mixture consists only of oil from such tanks and ballast water, provided that (1) the discharge is made as far as practicable from land and not to the landward of the seaward limits of the territorial waters of the United Kingdom ; (2) the ship is either a ship which is not fitted with an effective means of separating oil from water or is a ship which is so fitted but is proceeding to a United Kingdom port or to a port within a prohibited sea area being in either case a port which has not adequate facilities to receive oil residues. This exception will cease to have effect after June 30, 1958, in relation to a ship which is not fitted with an effective means of separating oil from water. Every vessel of less than eighty tons gross tonnage, whether registered or not and of whatever nationality, is exempted from section 3 (1) of the Act of 1955 which prohibits the discharge of oil into United Kingdom waters, in respect of a discharge from its bilges of a mixture containing oil where the only oil in the mixture is lubricating oil which has drained or leaked from machinery spaces.

The prohibited sea areas designated in the Schedule to the Act of 1955 are extended. In relation to tankers they now extend over so much of the North Sea outside the territorial waters of the United Kingdom as lies south of latitude 62° north and in relation to other vessels over a delimited part of the Atlantic Ocean outside the territorial waters of the United Kingdom.

For penalties for contraventions see section 6 of the Act of 1955 ([1955] Crim.L.R. 448).

# Practical Problems

*All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 3 Chancery Lane, London, W.C.2." The questions of subscribers only are answerable in the Review. All questions should be submitted in duplicate. The Publishers cannot accept any responsibility for the correctness of the replies.*

### 14. *Witnesses and justices' powers*

It is the practice, when a defendant pleads "not guilty," for the bench to instruct all witnesses (except the informant, witnesses as to character and expert witnesses) to leave the court and to remain within call. Undoubtedly, the justices have the same rights to *issue* this instruction to witnesses for the defence as for the prosecution. If the prosecuting solicitor states that he does not wish his witnesses to be out of court during the hearing, may the justices insist?

If the justices find there is a case to answer and the defending solicitor proceeds to call his witnesses *other than* the defendant first, have the justices any right to insist that the defendant be called first? It has been known for a solicitor to reply to the justices, "Surely it is for the defendant's solicitor to decide the best way of presenting the defendant's case to the court." He may, for example, wish to establish an alibi. The justices can point out to the solicitor that any corroborative value which his witnesses might have had will be lost if he insists on calling them to give evidence in the defendant's hearing and before the latter has given evidence. Can the justices do more? [H.]

#### ANSWER

Justices have no power to punish a prospective witness who refuses to leave the court when directed to do so ; and, if they were hearing a case at which the public were entitled to be present, it would be difficult to justify the assault involved in having such a person removed forcibly. But a direction for witnesses to leave the court would be unlikely to be disobeyed if the bench made it clear to all concerned that the weight to be attached to a witness's evidence might be affected should he insist on hearing the evidence of other witnesses before giving his own.

Rule 17 of the Magistrates' Courts Rules, 1952, which is headed "order of evidence and speeches: information" contains no directions as to the order in which witnesses for the defence are to be called. Section 2 of the Criminal Evidence Act, 1898, enacts that "where the only witness to the facts of the case called by the defence is the person charged, he shall be called as a witness immediately after the close of the evidence for the prosecution." This seems to leave it open to the defence to call the accused at a later stage if there are other witnesses as to the facts of the case. The value of the accused's evidence may, however, be very much affected if this course is taken. [A. E. J.]

### 15. *Are zebra crossing beacons larcenable?*

The following point has caused much argument in our section. The yellow plastic globe of a zebra crossing beacon was torn off the upright by a member of a touring rugby football club, with the intent that it should be taken back to their club room as a "trophy." The globe is secured to the pole by two metal bolts. The pole is cemented into the ground. It has been maintained that the globe forms part of the realty and therefore is excluded from the law of larceny. [R. B.]

### ANSWER

The matter to be decided here is whether the degree of annexation of the globe to the pole is sufficient to render it a "fixture" in the legal sense. The matter is one of some difficulty as is shown by Mr. J. C. Smith's article "Stealing a Hut" [1955] Crim.L.R. 404.

On balance, we think that the court might well decide that each particular globe, while it is on its pole, is sufficiently attached to the realty for it to form part of the realty, and so not to be larcenable. But from the practical point of view, and particularly in the light of the decision in *Billing* v. *Pill* [1954] Crim.L.R. 58, we feel that the police could, nevertheless, quite properly regard the globe as a chattel and so larcenable. In discharging their onus of proof that the globe was intended to continue as a chattel, we think they could usefully emphasise the slight nature of the attachment and the simple system of regular removal and replacement for maintenance purposes. [N. W.]

# Letters to the Editor

## Murder by Mistake

Sir,

May I refer to the article " Murder by Mistake " [1956] Crim.L.R. 375 at page 377:—

> " The child's continual crying threw him into a violent temper and he shook it, intending, according to his evidence, to quieten it, but not to hurt or kill it. *It died from the shaking.*"

Examination of the transcript of evidence will reveal that there were two depressed fractures of the child's skull caused, in the opinion of Professor Polson, during life, by a manual grip at the back of the head forcing the face forward against a resisting surface. They were inconsistent with accident and of a kind which would require the application of greater force and in such a manner as to be inconsistent with an accident.

The child's mother gave evidence to the effect that when she first saw the child after death it was bleeding from the side of the mouth, and her mouth was bruised. The latter evidence does to a certain extent corroborate the theory of Professor Polson.

Does Mr. Prevezer think that he is justified in ignoring such evidence and making the categorical statement " It died from shaking "?

Yours faithfully,
C. R. Byrne,
Det. Chief Inspector.

*Leeds.*

[Mr. Prevezer writes: " The views advanced as to the cause of death in *Ward* were conflicting and I stand corrected if my statement proved misleading in its context. I would point out, however, that, according to the *Law Reports,* the child's body was already in an advanced state of decomposition when discovered, that Dr. Polson was only one of the prosecution's medical witnesses, that the theory that the child died from asphyxiation apparently emanated from him alone and that the jury considered their verdict for some three hours and then requested the trial judge to assist them with that part of his summing-up which dealt with the law obtaining if they were not satisfied with Dr. Polson's evidence. It is that amended part of his summing-up, which depends on the construction of facts most favourable to the accused, which was approved by Lord Goddard and criticised in last month's article."]

## Larceny

Sir,

I have just read the report of *Moynes* v. *Coopper* in the Criminal Appeal Reports. At 40 Cr.App.R. 24 the Lord Chief Justice says that in the present state of our law the appellant was not guilty of any criminal offence.

In my view it is at least arguable that on the facts the appellant was guilty of fraudulent conversion under section 20 (1) (iv) (*b*) of the

Larceny Act, 1916. Lord Reading, when delivering the judgment of the Court of Criminal Appeal in *R.* v. *Grubb* [1915] 2 K.B. 683 at p. 689, in referring to this subsection said: "If the accused has obtained or assumed the control of the property of another person under circumstances whereby he *becomes* entrusted or whereby his receipt *becomes* a receipt for or on account of another person, and fraudulently converts it or the proceeds, then he has committed an offence within the section." This case was approved and applied in *R.* v. *Bottomley* (1922) 16 Cr.App.R. 184.

The fact that the ownership in the money passed to the appellant is no bar to a conviction for fraudulent conversion, indeed the editor of the latest edition of Russell on *Crime* is of the opinion that there cannot be fraudulent conversion unless the ownership has passed. It would seem therefore that all the ingredients of the offence of fraudulent conversion under section 20 (1) (iv) (*b*) of the Larceny Act, 1916, were present and that the appellant might well have been convicted of that offence if charged.

Yours faithfully,
J. H. BUZZARD.
Barrister-at-Law.

*Temple.*

[Mr. J. C. Smith has written an article about the decision in *Moynes* v. *Coopper*, see p. 516, above. On the point raised in this letter he writes: "This is an attractive argument. The *dictum* in *Grubb* undeniably covers the case. A difficulty, however, is that the courts have insisted that mere accountability for an equivalent sum is not enough and that the property must have been given for a specific purpose: *Jones* (1948) 33 Cr.App.R. 11; *Bryce* [1956] Crim.L.R. 122. In *Grubb* and *Bottomley* the owners sent money for investment; Moynes was given money to spend as he pleased.]

# Books and Periodicals

## Reviews:

*Law and the Engineer.* The law of contract and negligence as affecting engineers. By Christopher F. Mayson, A.M.I.E.E., Barrister-at-Law. London: Chapman & Hall Ltd. 1955. xx and 388 and (appendices, bibliography and index) 82 pp. (63s. net.)

There has for some time been felt a need for a book suitable both for students and practising engineers, whose work brings them increasingly in touch with various aspects of the law. This is the first book which attempts to fill that need.

The great difficulty in writing such a work is to know exactly where to draw the line in including detail which must of necessity be largely incomprehensible to the ordinary engineer who has no grounding in legal knowledge. It cannot fairly be said that the author of this book has managed to draw the line at the right place.

This book does not attempt to deal with the possible criminal activities of the engineering profession, although some reference to the criminal liability of limited companies and firms would have been helpful. The index reveals such entries as "grievous bodily harm" but the reference shows that the entry in the index is quite purposeless.

To summarise, it may be said that this is not the book which might have been desired, and at nearly 500 pages and 63s. it has attempted more than it could fulfil. It is, however, the only work of its kind now available to engineers, and its use as a reference book in engineers' libraries cannot be doubted.

F. MAURICE DRAKE.

*Famous Criminal Cases* (2). By Rupert Furneaux. London: Allan Wingate. 1955. xiv and 197 pp. (12s. 6d. net.)

This book contains 1954's crop of sensational cases and is Mr. Furneaux's second volume of crimes. Like the first volume, the book does not contain any material which the ordinary reader of the daily press has not already seen. Each case is little more than a thumb-nail sketch. The cases dealt with in this book include those of Ronald Harries, who murdered his relatives John and Phoebe Harries; the killing of the mother of one by two teen-age girls in New Zealand; Mark Langtry, who ran a "call-girl" business from an office in Oxford Street; Michael Onufrejczyk, who was convicted of murder although there was neither a body nor an admission; Mrs. Wheeler, who shot and wounded Lord Vivian; Dennis Murtagh and Kenneth Kennedy, who were convicted of homicide by means of a motor-car, but were successful on appeal; Gaston Dominici, who murdered Sir Jack Drummond, his wife and eleven-year-old daughter; Mrs. Christofis, who was convicted of murder for a second time; and Arthur Ford, who administered an aphrodisiac drug known as "Spanish-fly" to a girl and inadvertently caused her death. The book is not written by a lawyer, nor is it written for lawyers. It is essentially a book for those who want a brief record of sensational crime. If Mr. Furneaux continues to provide a volume a year, the avid reader will be able to build up a library of sensational crime sketches.

HENRY PALMER.

*Portrait of a Bad Man*. The Life and Death of Ronald Chesney. By Tom Tullett. London: Evans Brothers, Ltd. 1956. 196 pp. (12s. 6d. net.)

*Portrait of a Bad Man* describes the life and death of Ronald Chesney, international smuggler, murderer, war-hero and adventurer. The ingenuity of detective fiction writers can rarely have provided a stranger story than this. The author has taken an immense amount of trouble to present a complete picture, and must have interviewed many hundreds of people whose life touched that of Ronald Chesney. Nothing that Chesney did was undramatic. It seems almost certain that, at the age of 17, he murdered his mother, although the Scottish jury found the offence "Not Proven." Thereafter, Chesney lived by smuggling, frauds and other criminal ventures until his death by suicide in Germany in 1954. Chesney might have been a scholar, for, at school, he was top of his form in many subjects and had a particular flair for languages. He might have been a success in business, for he had a powerful personality and great personal charm. He was bold, rash, violent, sensuous, generous and superstitious. It was a strange streak in his character that he would be guided by his horoscope in the newspapers, particularly when contemplating some new venture. He considered himself bound by no laws, either legal or moral. He deserted his wife, leaving her in England to run an old folks' home at Ealing, while he himself lived with a succession of beautiful mistresses in France, Switzerland, Tangier and Algiers. His wife refused to divorce him, so finally, in order to obtain a share of her marriage settlement, he murdered her. After that murder, planned to the last detail as "the perfect crime," Chesney committed suicide when he thought the police had discovered that he was the culprit. *Portrait of a Bad Man* is a very well-drawn portrait of a man who was certainly bad but who was also fascinating.

HENRY PALMER.

*Friends at Court.* By Henry Cecil. London: Michael Joseph. 1956. 208 pp. (12s. 6d. net.)

This book continues the story of Roger Thursby, whose first year at the Bar was the subject of Mr. Cecil's *Brothers in Law*, published last year. Here we find Thursby twelve years later applying for silk in Chapter 1, and taking it in Chapter 24. In the intervening chapters we follow the course of a case of alleged bribery of a police officer from its commencement right up to the Court of Criminal Appeal. The grounds of the appeal to that court are of some interest to readers of this Review, turning on the correctness of a direction to the jury that they must be "reasonably sure" of the defendant's guilt. The judgment of the court is irritatingly punctuated by a dialogue between the appellant and the warder and is accordingly difficult to follow, but it is at least clear that Mr. Cecil is not enamoured of the decisions in *Summers* (1952) 36 Cr.App.R. 14, and *Hepworth* [1955] Crim.L.R. 576.

In the course of the book we see Thursby and others in action in various courts (and on the racecourse) and some of the episodes are very entertaining. Thursby also gets himself engaged in a desiccated sort of way.

The book makes good light reading, but we prefer Mr. Cecil in his earlier vein and hope he will now return to it.

M. W. M.

**Books Received:**

*Law and Disorder.* Scenes of life in Kenya. By Peter Evans. London: Secker & Warburg. 1956. xii and 292 and (index) 4 pp. (18s. net.)

*1,000,000 Delinquents.* By Benjamin Fine, Education Editor. The New York Times. London: Victor Gollancz, Ltd. 1956. 377 pp. (18s. net.)

*The Rise of Scotland Yard.* A History of the Metropolitan Police. By Douglas G. Browne. London: George G. Harrap & Co., Ltd. 1956. 379 and (bibliography and index) 12 pp. (25s. net.)

*The Food and Drugs Act, 1955.* With an introduction by John A. O'Keefe, LL.B., B.SC.(Econ.), Barrister-at-Law and annotations to sections by Robert Schless, Barrister-at-Law. Reprinted from Butterworths' Annotated Legislation Service. London: Butterworth & Co. (Publishers), Ltd. 1956. x and 197 and (index) 14 pp. (30s. net.)

*Cell 2455 Death Row.* By Caryl Chessman. London: Longmans, Green & Co. 1956. 311 pp. (16s. net.)

*Sexual Offenders and Social Punishment.* The evidence submitted on behalf of the Church of England Moral Welfare Council to the Departmental Committee on Homosexual Offences and Prostitution and other material relating thereto. Compiled and edited by Derrick Sherwin Bailey, PH.D. London: Church Information Board. 1956. 62 and (appendices) 56 pp. (6s. 6d. net.)

*Portrait in Grey.* By Norman Howarth Hignett. London: Frederick Muller Ltd. 1956. 233 and (appendices, addendum and index) 38 pp. (18s. net.)

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*Malicious damage*: Recklessness and claims of right are among the matters considered in an article about malicious damage: 96 *Solicitors' Journal* 407.

*Perjury*: The meaning of a verdict of Not Guilty is considered as a result of Ormerod J.'s remarks in the *Glinski* case (see [1956] Crim.L.R. 2): 120 *Justice of the Peace* 358.

*Road Traffic—Disqualification from driving*: Does section 7 (3) of the Road Traffic Act, 1930, enable an appellant who has been disqualified at quarter sessions to apply either to that court or the magistrates' court for the restoration of his licence?: 120 *Justice of the Peace* 374.

*Punishment*: Considering criminal punishment today His Honour Judge Richard Willes urges that there should be power to inflict corporal punishment "in exceptional cases of exceptional gravity": 221 *Law Times* 322.

*Juvenile delinquency*: The Principal of the Montefiore Special School in Chicago examines some misconceptions about juvenile delinquency: 46 *Journal of Criminal Law, Criminology and Police Science* 833.

*Forensic Science*: Efforts at disguise in typewritten documents are considered at 46 *Journal of Criminal Law, Criminology and Police Science* 867.

*Police*: The award of the Police Arbitration Tribunal on the claim that retrospective effect should be given to the pay scales which came into operation on December 16, 1955, is set out in full: *Police Review*, June 8, 1956, at p. 404.

THE
CRIMINAL LAW
REVIEW

*Editors*
JOHN BURKE and PETER ALLSOP, M.A.
*Barristers-at-Law*

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# *Editorial*

## Criminal courts in Lancashire

It is understood that commissions will be issued on September 1, 1956, to set up the Crown Courts at Liverpool and Manchester provided for by section 1 of the Criminal Justice Administration Act, 1956 (see [1956] Crim.L.R. 354). The Lord Chancellor will preside at the opening session of the Crown Court at Liverpool on September 25 and the Lord Chief Justice will open the Crown Court at Manchester on October 8.

## Aliens

The United Kingdom recently became a party to the European Convention on Establishment, which provides that, except where imperative considerations of national security otherwise require, a national of any contracting party who has been lawfully residing for more than two years in the territory of any other party shall not be expelled without first being allowed to submit reasons against his expulsion and to appeal to, and be represented for the purpose before, a competent authority or a person or persons specially designated by the competent authority. In the United Kingdom these safeguards are to be made available to all aliens.

The Chief Metropolitan Magistrate and his colleagues at Bow Street have been designated by the Home Secretary as the competent authority for the purposes of these provisions. Where a deportation order has been made or is contemplated against an alien otherwise than on the recommendation of a court of law, it will be open to him to ask for a hearing by the magistrate of any representations that he may wish to make, either in person or by his solicitor or counsel, against the order. The magistrate, after such examination of the objection or objector as he may deem sufficient, will make a recommendation to the Home Secretary as to whether or not the order should be carried into effect. The function of the magistrate is advisory and the Home Secretary has not bound himself to act on the magistrate's recommendation although he would normally do so.

This procedure will not be applicable where a deportation order has been made on the grounds of public security, or on the ground that the alien has landed in the United Kingdom without permission or, having been here less than two years, has failed to observe the conditions attaching to his stay.[1]

### Litter

A Private Member's Bill which sought to make the deposit of litter in any place without lawful authority a punishable offence was introduced in the House of Commons last November, but has now been dropped. The necessity for such an enactment is debatable since it may well be argued that there are already sufficient by-laws and regulations prohibiting the deposit of litter, and that the solution to this problem lies in their stricter enforcement and the education of the public.[2]

The by-laws of the Bedfordshire County Council were equal to an unusual case which came before magistrates at Bedford on June 21. The defendant was charged with depositing a quantity of household rubbish on a highway " so as to create a litter, contrary to by-law 24 of the by-laws duly made by the Bedfordshire County Council under section 249 of the Local Government Act, 1933." The defendant explained that his dustbin had not been emptied for three weeks, and after trying to burn the rubbish, he had attempted to take it by car to a rubbish dump. The rubbish fell off twice and the second time he put it in a ditch on the highway and left it there. The magistrates fined the defendant £3 and allowed him seven days to pay.

### Coroner's verdict

On July 27, a jury returned a verdict of suicide while the balance of his mind was disturbed at a second inquest on the body of Geoffrey Horwill. The Divisional Court quashed a similar verdict returned at a previous inquest on the grounds of insufficiency of inquiry (see [1956] Crim.L.R. 551).

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[1] H.C. Debates, Vol. 557, col. *174*; August 2, 1956.

[2] See H.C. Debates, Vol. 557, cols. 1761 *et seq.*; August 2, 1956.

## Forensic science laboratory

A branch Regional Forensic Science Laboratory has been established at Government Site, Broadway West, Newcastle-upon-Tyne, to provide services for police forces in the Tyneside area. Dr. I. M. Barclay is in charge of the laboratory, and Detective Inspector A. Chapman is the police liaison officer.

## Parliament

Before adjourning for the summer recess the House of Commons debated the work of the Home Office, and the House of Lords debated the present position of prisons with particular reference to after-care.

A number of subjects were raised in the Commons debate, including the law as to children, as to prostitution and the treatment of neglectful mothers. Replying, Mr. W. F. Deedes devoted most of the time available to him to the consideration of the position of aliens. Referring to prostitution he said that two problems were involved, the state of the law and the administration of the law as it stands. Although the present law is unsatisfactory, no change can be made until the Wolfenden Committee makes its report (H.C. Debates, Vol. 555, cols. 1001 *et seq.*; July 2, 1956).

The House of Lords considered the intractable problems which are raised each time prisons are discussed, such as overcrowding, lack of prison staff and lack of work for prisoners. Although he continually emphasised that there can be no complacency about our prisons, Lord Mancroft, in replying to the debate, drew attention to a number of improvements which have been made during recent years. A number of new workshops and laundries have been built, there are 1,000 fewer prisoners sleeping three to a cell than last year and sanitation in a number of prisons has been improved. An experiment is being tried at Dover of sending ordinary prisoners to training centres. After-care should be considered at the very beginning of a prison sentence and recognising this the Government recently sought the views of the prison staff consultative committees on the composition and working of reception boards (H.L. Debates, Vol. 199, cols. 426 *et seq.*; July 31, 1956).

Some capital works on prisons provided for in the 1956–1957 estimates are now to be deferred. Among the projects affected are a second new prison, the East-Hubert Psychiatric Institution, two new detention centres, two Borstal institutions, and a number of officers' quarters. It is hoped that it will be possible to complete within the current financial year the purchase of the site for the new prison and to make a start on site works in connection with the East-Hubert Institution (H.C. Debates, Vol. 555, col. *125*; July 5, 1956).

*Firearms*

The present Home Secretary has given no advice to the police concerning the confiscation of antique firearms, but at the time when the Firearms Act, 1937, came into operation they were told that it does not apply to antique firearms kept as curiosities or ornaments (Vol. 556, col. 593; July 12, 1956).

*Prostitution*

The number of arrests in 1955 of women soliciting to the annoyance of inhabitants or passengers or behaving in a riotous or indecent manner was 11,173. The number of convictions was 11,076 (Vol. 556, col. *108*; July 19, 1956). In the nine weeks up to July 23, 1956, eleven prostitutes in the West End of London were ordered to find a surety of £25 for good behaviour or go to prison for one month. Some magistrates do not like to deal with prostitutes in this way, because the effect is that if no surety is found the woman is sent to prison for an offence punishable only by a fine (Vol. 557, col. 1582; August 2, 1956).

*Police pay*

Legislation is to be introduced as soon as practicable which will enable effect to be given to alterations in police pay as from such date as may be agreed in negotiation or as, in default of agreement, may be recommended by the arbitrators (Vol. 556, col. 607; July 12, 1956).

## Judicial appointments

Mr. John Bussé, C.B.E., Q.C., has been appointed Recorder of the City of Gloucester. Mr. Neville Jonas Laski, Q.C., has been appointed Recorder of Liverpool in succession to Mr. Graham Rogers, T.D., Q.C., and Mr. Basil Edward Nield, C.B.E., Q.C., has been appointed Recorder of Manchester in succession to Sir Noel Barré Goldie, Q.C.

*Subscribers and others are invited to submit for publication articles and letters on matters of interest within the scope of this Review. They should be sent to the* EDITOR, *Criminal Law Review*, 3 CHANCERY LANE, LONDON, W.C.2. *Every effort will be made to return drafts or unsuitable copy but no guarantee can be given in this respect.*

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# The Davenport Case *

By J. W. C. Turner

## Introduction

The case of *R.* v. *Davenport* in 1954 [1] raised some interesting and important questions as to the principles of the felonies of larceny by servants and embezzlement, and the misdemeanour of fraudulent conversion. It is the purpose of the present article to discuss these, beginning with that part of the case relating to the three counts of the indictment in which the Court of Criminal Appeal held the accused to be guilty of embezzlement, in substitution (by virtue of the provisions contained in the Larceny Act, 1916, s. 44 (2) ) for the verdict of guilty of larceny brought in by the jury at his trial.

Since this decision is under criticism it is proper to observe, first, that the judgment of the Court of Criminal Appeal was not a considered one; and, second, that (probably owing to the course which the case had taken in the court of trial) the judges in the Court of Criminal Appeal did not have the benefit, which all judges are entitled to expect, of hearing full arguments of counsel on the principles of law applicable to the case before them. Indeed, counsel for the appellant conceded at the outset of the hearing that a verdict of guilty of embezzlement might have been possible at the trial, thus confining himself to the procedural point that the Court of Criminal Appeal ought not to substitute a verdict of embezzlement, even if it had the power to do so, as that aspect of the case was never considered by the jury. Two academic lawyers, Mr. Rupert Cross [2] and Mr. J. C. Smith,[3] whose views command serious attention, have written of the conflict as to embezzlement which in their opinion exists between the decision in *R.* v. *Gale* [4] and *R.* v. *Davenport* [5] on the one hand, and on the other hand *R.* v. *Wilson,*[6] *R.* v. *Cullum* [7] and *R.* v. *Aitken.*[8] Of these cases all that are earlier than *R.* v. *Davenport* have been accepted for many years as dependent upon, and enshrining, true legal principles of the crime of embezzlement. It might have been expected therefore that in deference to the ancient and salutary doctrine of *stare decisis* the new case of *Davenport* would have been regarded with some misgiving and examined carefully to see if the judgment enunciated any hitherto unrealised principles and had supported them by considered argument. Such an examination would indeed not have yielded very much, since the judgment in *R.* v. *Davenport* gives little more than a bare indication of the principles upon which the members of the Court of Criminal Appeal rested their decision.[9] But so far as appears from what they have written each writer seems to have approached the matter on the presumption that Davenport must be right and that in consequence the earlier cases must be discredited and jettisoned. Thus Mr. Cross writes:

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* This article is based on a chapter in the forthcoming 11th edition of Russell on *Crime.*

[1] [1954] 1 W.L.R. 569; 38 Cr.App.R. 37; [1954] Crim.L.R. 383.

[2] In [1955] Crim.L.R. 734.

[3] In 19 *Modern Law Review* 39.

[4] (1876) 2 Q.B.D. 141.

[5] 38 Cr.App.R. 37; [1954] Crim.L.R. 383.

[6] (1839) 9 C. & P. 27.

[7] (1873) 2 C.C.R. 28.

[8] (1883) C.C.C.Sess.Pap. XCVII 336.

> " The problem can only be completely solved by distorting the facts and ignoring the judgments in the last two cases," [Gale and Davenport] " for *R.* v. *Gale* and *R.* v. *Davenport* contravene the principle that a servant cannot embezzle anything obtained by an act outside the authorised scope of his employment unless it is assumed that the accused had authority to cash cheques. This fact is not given in the reports, and even if it were the case, it is not made the basis of any of the judgments. Accordingly, it is submitted that some of the decisions which have been mentioned will have to be jettisoned from expositions of the current law." [10]

More will be said about this line of approach later on but it may be as well to state at this point that it will be contended (a), that *R.* v. *Gale* does not conflict with the other cases and that it does not contravene the principle mentioned by Mr. Cross concerning the scope of the servant's authority; and (b), that the court in *Davenport's* case were not correct in identifying its facts with those in *Gale*; and (c), that there is no justification whatever for jettisoning the older cases in order to save *R.* v. *Davenport*.

Mr. Smith expounds an ingenious argument whereby to justify the decision in Davenport (*ex post facto,* in the sense that there is nothing in the reports to indicate that the legal points which he advances were in the minds of the judges who formed the Court of Criminal Appeal in the case) and whereby he claims it proper to repudiate as false the principles which *R.* v. *Wilson* and *R.* v.

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[9] Which is hardly a matter for surprise in view of the admission made on behalf of the appellant that embezzlement had been committed by him.

[10] [1955] Crim.L.R. 736.

*Aitken* have for so long been regarded as illustrating, with the consequential submission that these two last-mentioned cases should for the future be disregarded.

This article seeks to establish that Mr. Smith's very able exposition is unsound and that no support for Davenport's conviction can be obtained from it.

## Statutory Provisions as to Embezzlement; the Old Cases Decided Thereunder

Larceny and embezzlement by clerks or servants are statutory crimes the governing provisions of which are now contained in section 17 of the Larceny Act, 1916. The words of the section are clear and explicit and therefore the basic rule for interpretation of statutes applies, namely, that full effect must be given to their plain meaning.[11] The section reads:

> " 17. Every person who—
>
> (1) being a clerk or servant or person employed in the capacity of a clerk or servant—
>
> (a) steals any chattel, money or valuable security belonging to or in the possession or power of his master or employer; or
>
> (b) fraudulently embezzles the whole or any part of any chattel, money or valuable security delivered to or received or taken into possession by him for or in the name or on the account of his master or employer . . . shall be guilty of felony . . ."

The relevant words of the section, for the purposes of the present article, are:

### (i) *Being a clerk or servant*

It is not necessary to discuss the legal definition of " clerk or servant " since it is admitted that Davenport was so employed.

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[11] It is hardly necessary to give authority for this rule; but Tindal C.J. in *Warburton* v. *Loveland* (1831) 2 D. & Cl. (H.L.) at p. 489 for an old declaration, and for a modern repetition Lord Goddard C.J. in *Rose* v. *Matt* [1951] 1 K.B. at p. 813 may be cited. Although the draftsmanship of the Larceny Act, 1916, has by many critics been held to be unfortunately clumsy and defective, yet it is none the less an Act of Parliament and, therefore, an emphatic objection must be registered against any repudiation of the duty to read it according to the accepted canons of interpretation, such as seems to be inherent in the words of Mr. Cross at [1955] Crim. L.R. 739. That not merely decided cases but even the provisions of a statute of the realm should be sacrificed in order to uphold the latest judicial decision, for no better reason than that the decision has been given is a proposition which it is safe to say, no judge in this or in any other free community, would for one moment consent to entertain.

But from the beginning it has always been regarded as necessary that the stealing or embezzlement should have been committed by the servant while engaged in performing the duties of his service.[12] The criminal liability of the man depends not upon his general contractual relationship of service to his master but upon the fact that on the specified occasion he was carrying out some task which either expressly or by implication his contract with his master obliged him to do. Consistently with this conception a person who cannot be said to be under a regular contract of service with a master can yet consent to act, and be acting as servant in a particular situation. Thus there can be occasions when a regular servant is not acting as servant,[13] and also occasions when a person who is not a regular servant is yet acting as such.[14]

It must be noted that those cases in tort which deal with the employer's liability for the consequences of criminal acts committed by his servant [15] are not concerned with investigating the particular criminality of the servant but are directed to settling the right [16] of some injured third party to recover damages from the employer. In pursuit of this quest the civil courts have moved towards the use of the expressions " scope of authority " and " scope of employment " in meanings which have been criticised as artificial and unreal.[17] But in the crime of embezzlement we have solely to assess the criminality of the servant, and for this purpose we must confine our primary investigation to looking at the terms of the service between the master and the man, to ascertain what is comprised in his duty.

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[12] For example in *R.* v. *Hoare* (1859) 1 F. & F. 647, the court held that the prisoner was not a servant, when he was employed again after his contract of service had ceased.

[13] *e.g., R.* v. *Wilson* (1839) 9 C. & P. 27; *R.* v. *Harris* (1854) Dears. 344; *R.* v. *Cullum* (1873) 2 C.C.R. 28; *R.* v. *Read* (1878) 3 Q.B.D. 131; *Cheshire* v. *Bailey* [1905] 1 K.B. 237 at p. 241; *Barker* v. *Levinson* [1950] 2 All E.R. 825.

[14] *R.* v. *Spencer* (1815) R. & R. 299; *R.* v. *Hughes* (1832) 1 Mood. 370; *R.* v. *Beaumont* (1854) Dears. 270; *R.* v. *Foulkes* (1875) 2 C.C.R. 150; *R.* v. *Gibson* (1861) 8 Cox 436.

[15] *e.g., Lloyd* v. *Grace Smith & Co.* [1912] A.C. 716; *Uxbridge Permanent Benefit Building Society* v. *Pickard* [1939] 2 K.B. 248.

[16] For this purpose the civil courts have, *inter alia,* imported the notion of " ostensible authority." See, *e.g., Uxbridge, etc.* v. *Pickard*, above, at pp. 254–255, *per* the Master of the Rolls: " The very essence of the present case is that the actual authority and the ostensible authority [to the clerk], were of a kind which, in the ordinary course of an everyday transaction, were going to lead third persons, on the faith of them, to change their position." In effect the courts are considering not so much whether the servant is really acting in the course of his duty, but whether it appears to the third party as if he is so acting, and whether it can be held to be the master's responsibility that it has so appeared.

[17] See, *e.g.,* Winfield on *Tort*, 6th ed., pp. 146 *et seq.*

Notwithstanding this difference the question whether or not a man was acting in the course of his employment as servant is both for the purpose of tort and for the purpose of criminal law, a question of mixed law and fact for the judge,[18] in this sense, that whereas the jury must decide as to what has been said and done by the employer and by the employee it is for the judge to decide whether the facts so found by the jury can be regarded as establishing (a) that the man was employed as servant, (b) that in the activity which he was pursuing when he took or received the property into his possession he was discharging a duty required by his contract of service, and (c) that the terms of his contract of service required him to pass those same identical objects of property into the possession of his master. Where a question of fact has to be settled it is inevitable that decisions reached, whether by juries or by judges, should display some variation, in so far as they merely reflect the conclusions on the evidence reached by each separate tribunal. In assessing this situation there is a risk of falling into the error (insidious, but unfortunately common) of mistaking a question of fact for a question of law. The following examples illustrate this situation.

*R.* v. *Snowley* (1830) 4 C. & P. 390. S. was charged at assizes with embezzlement. He was employed to walk a stallion and ordered to charge not less than 20s. for each service; in breach of his orders he accepted 6s. for one service and retained the money. The statute then in force required that the money should have been received " by virtue of his employment " as well as " for or in the name of, or on account of, his master." Parke J., after consulting Littledale J., held that this money was not received " by virtue of his employment." This may perhaps be regarded as a narrow view of the facts, but it cannot for that reason be declared to be wrong in a point of law.

✓In *R.* v. *Wilson* (1839) 9 C. & P. 27, it appeared that W. was a servant employed by an oilman, P., as town traveller, to solicit and take orders from customers, to enter the orders in the order book on returning to the shop, and to receive money in payment for such orders; but he had no authority whatever to take, or to direct the delivery of, any goods from the shop. W. obtained an order from a customer C. for two things, pickles and treacle, but he entered pickles only in the order book, and the invoice was accordingly made out by his master's brother for pickles. This invoice, and the pickles, were given to the carman, who, acting in collusion with W., made an entry for the treacle at the foot of the invoice, and delivered both pickles and treacle to C., the pickles being charged on the invoice at 6s. 6d. and the treacle at 4s. 6d. Subsequently W. collected 11s. from C. but paid over to his master 6s. 6d. only. W. was charged with embezzlement of 4s. 6d. The case was tried before Mr. Recorder Law who expressed the opinion that the offence was larceny [of the treacle] and not embezzlement of the money, but he suspended the proceedings while he went to an adjoining court to consult Patteson J., and on returning said "I have conferred with Mr. Justice Patteson, who concurs with me in the opinion I was inclined to entertain of this question; and, on his suggestion, I may put the case in this form—that the prisoner . . . does not receive the 4s. 6d. for or on account of his master, but contrary to, and in breach of, his duty towards that master . . . and he cannot be said to have been employed and intrusted as clerk and servant, and to have received the money by virtue of such employment, where the act is done contrary to that employment."

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[18] *Marsh* v. *Moores* [1949] 2 K.B. 208, *per* Lynskey J. at p. 215; *Warren* v. *Henlys* [1948] 2 All E.R. 935; see Salmond, *Jurisprudence*, 10th ed., p. 195. That it is for the judge to say whether or not the man, at the critical moment, can properly be held to have been acting in the capacity of servant is illustrated by the remarks of Pilcher J. in the case of *Crook* v. *Derbyshire Stone, Ltd.* [1956] 1 W.L.R. 432 at 436, " . . . in the present case, on the admitted facts, I am not satisfied that it would be proper to say that, although permitted to do what he did, Thorpe was in fact discharging his duty to his employer at the time when the accident occurred. I think he was not. I think at that moment of time he was a stranger to his employer. . . ."

In this case (a) the principle is clearly indicated that if the act done is contrary to the employment, then the man is not acting as servant and the money received is therefore not received on account of the master and is not feloniously embezzled; and (b) the court decided that on the facts the act was done contrary to the employment: this last point (b) was a decision of mixed fact and law which was for the judge and must be accepted as such. It is open to critics to differ from the judge on his assessment of the facts, but however misguided he may have been in that assessment, that does not in itself invalidate the legal principle which he was applying, so as to make it proper to disregard this case altogether. Nor is it permissible to brush the case aside[19] on the ground that it was no more than a recorder who decided it: even if that could be sufficient ground for getting rid of a legal principle it cannot apply here since the report shows that the view of the law taken was that of a judge as well as of the recorder. As will be submitted below the *principle* applied in *R.* v. *Wilson*[20] is not inconsistent with that applied in *R.* v. *Gale* [1]; it is in the assessment of the facts that the difference between the two cases appears. The weakness in *R.* v. *Wilson*, if indeed there is a weakness, could perhaps be argued on the following points. That it was outside the scope of W.'s authority to cause goods to be taken out of the shop and disposed of is clear enough; and the dishonest taking of the treacle [2] was probably a larceny.[3] But it is also clear that the collection of money paid by a customer for goods which he had ordered and received from the shop was exactly what W. was employed to do and was in fact what he did: that he had dishonest intentions in the matter is irrelevant to the question of what his duty was; and therefore, on the principle stated, he ought to have been found guilty of embezzling the money. But even if these objections to the decision be accepted as well grounded, they do not go to refute the principle contended for above, but only assert that the judges were mistaken in deciding in effect that on the particular facts of the case Wilson's duties as servant did not cover the collection of the sum of money in question.[4]

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[19] 19 *Modern Law Review* at 52.

[20] (1839) 9 C. & P. 27.

*This is not included
in the 1916 Act.

*R.* v. *Aston* (1847) 2 C. & K. 413. A. was a drayman employed by F. a brewer: he sold beer below the authorised price to X. His master, F., having heard of the sale, without informing A., authorised X to pay the money to A., which X did. A. dishonestly retained this money. Patteson J. after conferring with Parke B. (as he then had become), said he doubted the authority of *Snowley's* case; but that since in the present case the master had authorised X to pay the money to A. so that the master could not then demand more from X the evidence was sufficient to support the indictment, so that A. must be convicted. This clearly means that in the opinion of the two judges *on the facts of the case* the money was received "by virtue of his employment" and "on account of his master," since both requirements of the statute had to be satisfied.

✓*R.* v. *Harris* (1854) Dears. 344. Harris was employed to operate a mill in the county gaol. The terms of his employment required that he should operate the mill if the person who brought the grain handed to him a ticket obtained from the porter's lodge, but not otherwise, and that, having ground the grain, he should receive the payment and pass it on to the governor of the gaol. In breach of his orders he had accepted and ground grain brought by persons who did not obtain or hand over to him the requisite tickets, and he dishonestly retained the money which they paid him. He was convicted of embezzlement of this money but the case was reserved for the judges as there were several points of difficulty relating to venue, to power to amend the indictment, the question of which person or body was his employer, and whether the money was received on account of his master. On this last point the judges held unanimously that his conviction should be quashed. In the course of the hearing Pollock C.B. said " If a workman employed in a blacksmith's shop, who has engaged to give his master his whole services, is asked by someone to do for him a little work in the shop which only requires labour, and he does the work, and says to the man pay me 2d. for the job, and say nothing about it, the workman could not be indicted for embezzling the 2d., though he might be guilty of breach of his contract, which was to give his master his entire labour." Parke B. said " Suppose the prisoner had sent to a friend and said 'I will grind your corn at a cheaper rate than the regular price,' the doing so would be a misuse of power of his master's mill; . . . if . . . for his own benefit, how could it be said that he received the money by virtue of his employment? As at present advised, I think I was right in my decision in *R.* v. *Snowley*." In delivering the judgment of the court Pollock C.B. said " the only point upon which we give our unanimous opinion is that upon the facts stated it appears that the defendant had no right to receive and grind any corn on behalf of his masters, except such as was brought to him with a ticket. The reasonable conclusion to be drawn from his receiving and grinding the grain without a ticket is that he intended to make an improper use of the machinery intrusted to him by using it not for the benefit of his masters but for the benefit of himself. We think therefore that the money which he received was not received on account of his masters, and that he cannot be said to be guilty of emblezzlement." Since Pollock C.B. stated that the judges were unanimous as to the ground which he gave in the judgment for quashing the conviction it follows that Baron Parke, as one of them, must have agreed that the money was not received by Harris on account of his masters; having as an additional reason for quashing the conviction his own view that it was not received " by virtue of his employment." This decision, it is submitted, was a good one: for suppose Harris had bought some corn for himself, and had brought that into the mill and without taking a ticket for it had ground it and paid nothing to the governor thus getting the economic advantage for himself from the use of the mill, how could it be said that he was acting as servant in that matter or that he was embezzling anything? And if he afterwards sold the flour he had thus milled at a higher price than he had paid for the grain, how could that make any difference to the question of his criminal liability? Yet in either of the two cases the master could well have a civil action against the man for breach of contract, so that it could be said that he was accountable to his master—but his accountability would be for his misconduct (*i.e.*, to pay damages for failing to act as servant), not for what he had received.

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[1] (1876) 2 Q.B.D. 141.

[2] By whomsoever effected; the report does not reveal any evidence that it was handled by W. and so stolen by him as principal in the first degree: if he was not, he was certainly accessory before the fact.

[3] We do not know how the selection of goods for removal and dispatch was organised in that shop, but it is probable that the owner P. did not consent to the taking of the treacle in the circumstances.

[4] *Cf. R.* v. *Williams* (1834) 6 C. & P. 626, where the prisoner was authorised to collect money but not from the particular class (*regular* customers) from whom he in fact collected the money in question—held guilty of embezzlement; and *R.* v. *Thorley* (1832) 1 Mood. 343, as also *R.* v. *Hawtin* (1836) 7 C. & P. 281, in each of which the prisoner was not authorised to collect money at all and was held not guilty.

*R.* v. *Cullum* (1873) L.R. 2 C.C.R. 28, was decided on exactly the same point. The prisoner was a servant employed as captain of a barge, remunerated with half the earnings of the barge, and had no authority to take any other cargoes but those appointed for him: it was his duty to account to his master for the proceeds of each voyage. He asked his master's permission to carry, on a return voyage, a barge load of manure to a named place and person. The master forbade him to do so and ordered that the barge be brought back empty. Cullum, in breach of these instructions, did load up the manure into the barge and delivered it to the named person whose representative paid him £4 freight for the service. C. did not represent that he was acting for a master and the payer did not know or think that he was acting as servant for anyone. The prisoner kept the £4 and so far from accounting to his master falsely denied, when subsequently challenged, that he had carried the load or been paid anything for doing so. The Court for Crown Cases Reserved on the case reserved held unanimously that Cullum's conviction of embezzlement of £2 must be quashed. Blackburn J. (at p. 33) expressed his approval of a statement[5] " it must still be the master's money which is received by the servant " as correct, and held that in this case the money was not the master's property and further that the prisoner did not receive the money for the use of his master; " . . . the servant never assumed to act for his master, and on that ground his act does not come within the statute." This last remark shows that the judge considered that the servant was acting outside the scope of his authority and therefore was outside the scope of the statute. We shall see that it is not *necessary* that the master should be

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[5] Quoted from a textbook.

" owner " of the embezzled property[6]: so that the judge's allusions to " the master's property " and the money becoming the master's were strictly irrelevant; but they were in fact due to his preliminary excursion into the historical background of the statute creating the crime of embezzlement, into which he erroneously imported the notion of the *ownership* of the property by the master: he said (at p. 33):

> " . . . the legislature said ' He who embezzles shall be guilty of stealing although the property has not become the master's except by the possession of the servant ' . . . the essence of the matter is, that the servant shall be deemed to have stolen the master's property, if it be the master's property, although not received otherwise than in the prisoner's capacity of clerk or servant."

That this statement is not correct can be seen at once by a perusal of the original statute, the Embezzlement Act, 1799, and the provision which replaced it, the Larceny Act, 1827, s. 47. In neither of these is there any mention whatever of the master's ownership or the " master's property "; these statutes speak only of possession, the former mentioning only the possession of the servant and not the possession of the master, and the latter adding " although such chattel, money, or security, was not received into the possession of the master otherwise than by the actual possession of the offender."[7] His mistake led Blackburn J. into stating too narrow a definition of the requirements of embezzlement and into an illogical sequence of thought when he came to bring the facts of the case into relation with the words of the statute. His sequence was (a) " if a man does not act for his master ( = in his capacity as servant) then his act does not come within the statute, and therefore he is not guilty of embezzlement; (b) if a man does not act for his master then the property does not become the property of the master; (c) therefore the reason that he is not guilty of embezzlement is because the property does not become the property of the master."[8]

Bramwell B. was prepared to " look at the substance of the charge " but said that when he did so he could not see that the wrong committed was fraudulent or wrongful with respect to money, but consisted in the improper use of his master's chattel. He did not state expressly the reason why it was not fraudulent, but his reference to the suppositious case, which he put, as "more evidently out of the limits of the statute" implies that the reason was because it did not fall within the statute's limits; and, indeed, he went on to say expressly that he did not think the case to be "even within the words of the statute, since Cullum undoubtedly did not receive the money 'for' nor 'on account of' nor 'in the name of' his master."

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[6] This point will be enlarged below.

[7] These words do not occur in s. 17 of the Larceny Act, 1916.

[8] This is equivalent to saying " If a creature is a dog then it is an animal and therefore not in the genus insect; but if a creature is a dog then it is not a cat; therefore the reason why a dog is not in the genus insect is because a dog is not a cat."

Bovill C.J. quoted the words of the statute and said that they were "essential to the definition of the crime. . . . The prisoner here . . . earned the money . . . not for his master but for himself. . . . Under these circumstances the money would not be received 'for,' or 'in the name of,' or 'on account of,' his master, but for himself, in his own name, and for his own account. His act, therefore, does not come within the terms of the statute, and the conviction must be quashed."

Archibald J. concurred, indicating that he had had a doubt whether the facts showed a contract between the master and P., the payer of the money, in which case the money earned by the use of the barge might not have been "the money of the master, that is, if, instead of a cash payment, the manure had been carried on credit, there might not have been an implied contract to pay for the carriage to the master." But reflecting on the facts, he thought that the contract was with the servant, and that no action by the barge owner against the owner of the manure could have been maintained: and that the case did not come within the statute.

In face of the words of the report it is difficult to see how it can be maintained [9] that "three of the four judges who delivered judgments based their decision on the fact that Cullum's master did not become owner of the money which Cullum received." Bramwell B. did not say one word about the master's not owning the money, nor about Cullum's owning it: that Cullum in fact *would* own the money paid to him was only an incidental matter for the purpose of Baron Bramwell's judgment.[10] Archibald J.'s remarks about "the money of the master" clearly were a loose way of saying that the master could have had a contractual claim that the other contracting party who owned cash as well as manure should transfer the ownership of some of that cash to him.

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[9] In 19 *Modern Law Review* at 49.

[10] And also for the purposes of Mr. Smith's argument, which is that the decisive point is whether or not the *master* owns the money. Digressing for a moment, the real reason why ownership of the money by the servant would negative embezzlement is because in that case it would *not* be the servant's duty to pass on to the master the *identical coins* given to him, whether in the course of his duty as servant or not. For example, if in the course of collecting money for his master the servant is allowed to mix what he collects with his own money and account to the master with other money, or by his own cheque, then if he fraudulently pays the master a smaller sum than is really due, he cannot be guilty of the felony of

*R.* v. *Gale* (1876) 2 Q.B.D. 141. Gale was manager of the head office of the company whose servant he was. It was in the ordinary course of his duty that he should open all letters and receive remittances for the office both in cash and in cheques, and should hand on the cash and cheques to the cashier of the company, after indorsing such cheques as were made payable to his order. The cashier then paid all into the company's bank, accounting for all details in the books. On the material dates Gale received on account of the company one cheque for £400 and another for £200 made payable to his order. He did not hand over these two cheques to the cashier nor inform him of their arrival, but indorsed them and cashed them through private friends of his own who gave him the money and paid the cheques into their own banks. Later in the day Gale handed £600 in gold and bank notes as his own to the company's cashier and told him to set this money against his salary which was then overdrawn to that amount. The cashier in good faith took the money and returned to Gale the IOUs which Gale had given him in respect of the overdraft. The full truth of the matter was not known till some months later when the prisoner had left the company's service and become bankrupt. Gale was charged in two counts, one for embezzlement of £400 and the other for embezzlement of £200. Counsel for the prisoner submitted that there was no embezzlement, (a) since each cheque was payable to his order and required his indorsement, so that he was entitled to the money he received for them, and (b) since the identical money he received was paid by him to the cashier, although paid as though it were his own money in discharge of his overdraft. Gale was convicted but the case was reserved for the Court for Crown Cases Reserved who affirmed the conviction on the grounds that Gale received the money on account of his masters since it was his duty to pay over the proceeds of the cheques at once in whichever way he received them: and having dealt with that money as he did he showed that he intentionally appropriated it to his own use. The salient facts in *R.* v. *Gale* were that Gale, in the ordinary course of his duty, regularly received into his possession cash destined for his masters, and it was his duty to pass this cash

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embezzlement but will be guilty of the misdemeanour of fraudulent conversion contrary to the Larceny Act, 1916, s. 20 (i) (iv) (*b*). So also *R.* v. *Solomons* [1909] 2 K.B. 980; Kenny, *Outlines of Criminal Law*, 16th ed., p. 272.

over into their possession: it was also his duty to indorse and pass over such complete and valid cheques as had come into his possession. It was therefore no forgery by him when he indorsed the two cheques which he cashed. Looking at the evidence the Court for Crown Cases Reserved unanimously held that whether he received the cash in the first place or whether he received it as the result of cashing the cheques which had come, in the course of his duty, into his possession, he received it "on account of his masters" and he did so because it was his duty to pay over the proceeds at once, in whichever way he received them. Cockburn C.J. said "It is the same case as if, being on his way to cash the cheques, he had met a friend in the street who cashed them for him, to save him the trouble of going to the bank." The court's decision rested purely on their interpretation (a) of the words of the statute [11] holding that "received on account of the master" rendered irrelevant the fact that the persons who gave Gale the money knew nothing of his masters and therefore did not *pay to* the account of the masters: and (b) of the evidence as to what his duty comprised, namely, to bring in the payments of his masters' debtors, in whatever form he held those payments in his possession.[12]

✓ In *R.* v. *Read* (1878) 3 Q.B.D. 131, according to the report the prisoner was servant of S. who employed him as gamekeeper, "to look after a wood in which S. had been granted the game and rabbits [13] and rights of sporting by the owner." Read was not allowed to kill or to take rabbits off the land but in breach of his orders he did take eighteen rabbits and was bargaining to sell them to someone when he was apprehended. He was convicted of embezzling the rabbits, but the case was reserved for the judges in the Court for Crown Cases Reserved who quashed the conviction; Cockburn L.C.J. recited the words of the statute and said "It is impossible to bring the present case within these words," the other five judges agreeing. This had been the contention of counsel who appeared for the prisoner. The effect of *Blades* v. *Higgs* (1865) 11 H.L.C. 621, which was concerned with the ownership of creatures killed on the land (a case of which Blackburn J. in *R.* v. *Townley* (1871) L.R. 1 C.C.R. 315, had said " even in the case of *Blades* v. *Higgs* . . . it was expressly pointed out that it by no means followed that an indictment for larceny would lie "), was plainly brought before the court by counsel on each side, and the court showed that they thought the question of ownership did not arise.[14] The point of the case was that Read in taking and killing the rabbits was beyond any doubt acting entirely outside the scope of his contractual duties of service. It has been suggested that the judges " did not give reasons for their doctrine " [15]; one can only reply that it is not easy to see what better reason they could give than to say that it was impossible to bring the case within the words of the statute.

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[11] Larceny Act, 1861, s. 68, the relevant words of which are re-enacted in the Larceny Act, 1916.

[12] They disregarded the submission that had at one stage been made by defending counsel that there could be no embezzlement since the prisoner had handed over the cash to the cashier; this was obviously an unsound point since the retention was plainly shown by the fact that he was treating the money as his own in every respect. *Cf. R.* v. *Hall* (1848) 1 Den. 381, for a similar situation in a case of larceny.

[13] The owner of the land has no ownership of the game and rabbits so long as they are alive, so that he could not legally grant those creatures to S., but only allow him to enter the land to catch and kill them and take them for himself, *i.e.*, grant to him the sporting rights.

*R.* v. *Aitken* (1883) 97 C.C.C.Sess.Pap. 336. In this case it appeared to be admitted that the prisoner was the prosecutor's servant, employed to help in the keeping of her accounts. It was established that he had forged certain of his employer's cheques,[16] had cashed them at her bank, and had dishonestly retained the money. He was charged with embezzling this money but was acquitted, since, as the report states, " The court considered that as the prisoner did not receive the money in his capacity of servant but on forged cheques, there was no embezzlement."

The principle on which the decision was rested is quite clear, namely, that the prisoner was not acting within the scope of his employment. This is the principle on which, as has been submitted, all the cases so far examined had been decided. Can it be reasonably maintained that a servant when engaged in committing crimes of forgery and obtaining money from a bank on forged instruments is acting within the scope of his employment as servant? It has been suggested against *R.* v. *Aitken* that *R.* v. *Gale* was not referred to; but there is no reason why it should have been cited. There was no forgery whatever in *R.* v. *Gale*, and no crime at all except in the retention of the money after Gale had received it, when the crime with which he was charged, embezzlement, was achieved. The two cases are quite different in the material point.

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[14] Even if it had arisen there might have been a nice point, since *Blades* v. *Higgs* laid down the doctrine that the ownership of the game killed on the land vested in the *owner of the land*: in Read's case his master was not owner of the land but grantee of the sporting rights over the land.

[15] 19 *Modern Law Review* 46.

[16] The evidence was not entirely clear as to whether or not the signatures to the cheques were forged as well as the amounts. It does not follow as suggested in 19 M.L.R. at p. 42, that " the case was therefore presumably decided upon the assumption that the mistress did sign the cheques." But even so that was irrelevant so far as the crime of forgery was concerned, which was the essential point.

On the basis of the preceding pages it is submitted that it would be contrary to plain sense to maintain that when a servant commits a crime against his master, that conduct could possibly fall within the terms of his service to his master. At this stage it is necessary to observe that the crime of larceny by a servant has important differences from the crime of embezzlement. Larceny by a servant is dealt with in section 17 (1) (*a*) of the Larceny Act, which specifically requires that the property stolen shall have been " belonging to or in the possession or power of his master." Now a servant has the consent of the owner, his master, when he handles his master's property of which he has custody or to which he has normal access[17]; but he does not have legal possession of that property.[18] This handling is within the terms of the man's service. But a servant does not have the consent of his master when he dishonestly takes possession (a legal possession although *mala fide*) of that property with intent permanently to deprive the master of it. For want of the owner's consent this taking is a trespass and he thereby commits larceny; so that in larceny by a servant the crime is effected when the servant *first acquires* (*legal*) *possession* by dishonestly taking the thing. As will be shown in (iv) below, the crime of embezzlement depends upon a dishonest misappropriation of the property by the servant *after* it has come into his legal possession.

### (ii) *" Fraudulently "*

This means " without a claim of right made in good faith ": for our present purposes no more need be said of this since clearly Davenport did not have nor plead such a claim.

### (iii) *" Chattel, money or valuable security "*

On this also no question arises since Davenport was charged with embezzling cash and cheques. But it is important to remember that it has always been held that the words " chattel, money or valuable security" (which occur also in section 32 of the Act) cover nothing beyond what is "a thing capable of being stolen" as defined for the purpose of the crime of simple larceny. The original statute (Embezzlement Act, 1799) declared that if the offender should fraudulently embezzle the sum "he shall be deemed to have feloniously stolen the same from his master." Therefore whether the charge be made under (a) or (b) of section 17 (1) the prosecution must prove that a specified material object (and not, *e.g.*, a difference of value, or a chose in action) has been purloined. And the words "or any part of . . ." mean any *material* part of the object or objects delivered and *not*, for example, a portion of the *value* of an object. So that if A gives to B, the servant of X, a half-crown for X, and B keeps the coin and passes on a two shilling piece to X, B embezzles the half-crown and not sixpence.

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[17] Query whether s. 17 (1) (*a*) " being a clerk or servant . . . steals etc." confines this crime to the case of the man stealing such property as he does have in his custody or to which he has normal access; so that a servant who picks his master's pocket should be charged under s. 14 of the Act, and one who steals a visitor's bicycle or finds and retains what he knows to be his master's wallet lost on the highway, should be charged under s. 2 for simple larceny. Note the indictment in *Moynes v. Coopper* [1956] Crim.L.R. 268.

[18] For the history of this matter, see Russell on *Crime*, 10th ed., pp. 1071 and 1075 *et seq.*

### (iv) "*Delivered to . . . him for or in the name or on the account of his master*"

Turning now to embezzlement and subsection (1) (*b*),[19] these words, which as above stated must be read in accordance with their plain meaning, indicate the situation where the owner of the property who delivers it into the possession of the servant causes the servant to know (whether by express words or otherwise) that he intends that this specific property shall be passed on by the servant to his master.

### (v) "*Received or taken into possession by him for or in the name or on the account of his master . . .*"

These words also are clear and explicit; and since the section must be read as a whole they are governed and controlled by the opening words "being a clerk or servant." Accordingly they cover the situation where the owner of the property who delivers it into the possession of the man does not know, or is indifferent to, the fact that the man has any duty, whether as servant or otherwise, to any third party; but the opening words of the section require that the terms of the man's service shall be such that they put upon him, on this occasion, the duty to pass on the specific property (chattel, money or valuable security) into the possession of his master. In other words the section requires that in taking the object into his possession the man should be acting within the scope of his duties as servant. And it must be noted that here, as also in

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[19] Incidentally it may be noted that in this clause (b) the section makes no mention of property "belonging to, or in the possession or power of his master," an omission to which reference will be made later in this article.

(iv) above, there is no crime at all against the master in the servant's receiving or taking possession of the object (as there is in the case of larceny under section 17 (1) (*a*)); the crime is committed at the moment [20] of the embezzlement, *i.e.*, of the fraudulent *retention* of the object after it has come into the servant's possession, a retention made in breach of the duty to pass on the object into the possession of his master, which duty is derived from the terms of his service. In other words it must be a duty which he owes because he is a servant. The terms of service may be explicitly and strictly defined in the contract of service; but in many instances of service agreements between ordinary people this precision is not displayed, and then the evidence of the agreement between master and servant must be interpreted in a sensible way to accord with the generally accepted practices of everyday life. It is conceived that, consistently with this view, a servant in certain circumstances can be held voluntarily to enlarge somewhat the scope of his duty to include some performance which the description, strictly understood, of his type of employment would exclude. Thus if a man employed as a gardener were at the request of his master to go off to do something completely disconnected from anything to do with gardening (*e.g.*, to buy a theatre ticket or medicine for his master, or to post his letters) it might well be considered that he was acting as servant on that occasion. But, on the other hand, the man cannot at his discretion vary the terms of his contract so as either to reduce the duties which he has contractually obliged himself to perform, or to decide whether or not any particular act which he does shall rank as a performance of those duties. That is to say, it is for the court and not for the man himself to determine, first, what duties the contract required the man to do, and second, whether on the facts of the case (as found by the jury) the man was engaged in performing those duties (*i.e.*, was acting as servant) on the occasion in question when some specifically identifiable chattel, money, or valuable security came into his possession. Unless the court is satisfied on this last point the jury should be instructed to acquit the man of the charge of embezzlement. So, as we have seen, in the cases of *Snowley* (1830), *Thorley* (1832), *Hawtin* (1836), *Harris* (1854), *Cullum* (1873), *Read* (1878), and *Aitken* (1883) the courts held that the man was not acting as servant, while in the cases of *Williams* (1834), *Aston* (1847) and *Gale* (1876) the courts held that he was.

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[20] At, and not before, that moment. Accordingly it is irrelevant how long or how short a time may elapse between the formation of his fraudulent intent (*i.e.*, his *mens rea*) which may well have existed before the object came into his possession, and the execution of that intent (*i.e.*, the achievement of the *actus reus*).

It has been observed that the words " by virtue of his employment " which occurred in the statutes of 1799 and 1827 were omitted from the Larceny Act of 1861 ; Sir James Stephen said [1] that the omitted words had " introduced an element of uncertainty into the law which has been removed by their omission " ; he did not, however, explain what that uncertainty was. The omission clearly did not relieve the prosecution of the burden of proving that the prisoner was " a clerk or servant or person employed in the capacity of a clerk or servant " ; for the line of cases reported in the years following the Act of 1861 shows that the courts were acting on the same principles as before, in requiring that the man should have been acting as servant in the activity which resulted in the property coming into his possession. Indeed it would seem from the cases that the words included might as well have been omitted, as surplusage, from the first enactment, and that the " uncertainty " may have been the difficulty in discovering any special purpose in their insertion.[2]

It is, however, suggested that, whatever the legislature may or may not have expected that the result of the omission would be, it did eliminate any question of the words excluding from embezzlement the man who had, as above described, voluntarily enlarged the scope of his contractual obligations of service in a particular case by undertaking to receive property into his possession for transmission to the man to whom he is servant for the performances of acts of service different from this one.

But even when the courts are satisfied that the man at the material time was acting within the scope of his duties, it is easy to see that he will *not necessarily* be guilty. A simple case would be where a servant receives a gratuity from a third party who is benefited as the result of the servant's performance of a duty to his master, in which case the donor passes the ownership of the coins to the servant for himself, the servant thus receiving the property in the course of his employment but not for, or on account of, his master ; another would be where the terms of the service, or the facts of the situation necessarily involve the servant's acquisition not merely of possession but also of ownership of the property handed to him, so that he is not under any obligation to pass the identical thing over to his master but only to account to him for the value of it, or a part thereof.[3] This at least is clear: that if the ownership of property is passed to a servant he cannot be guilty of embezzling that property whether or not he be guilty of some other crime in respect of his use of it.[4]

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[1] 3 H.C.L. 154.

[2] Baron Bramwell in *R.* v. *Cullum* (1873) L.R. 2 C.C.R. at p. 32, drew attention to the difficulties which might arise as to the precise meaning to be given to the words " in the name of " his master, which he described as " a very curious expression," adding that these words " although inserted with a desire to obviate difficulties, seem to me likely hereafter to raise them."

✓An instructive case is *R.* v. *Hoare* (1859) 1 F. & F. 647. It appeared that the prisoner H. had been servant, as farm bailiff, of C. This employment ceased when C. sold the farm; but C. then re-employed H. to collect some outstanding debts due to C. The report states that " it was in the course of this employment " that H. collected certain sums which he did not account for to C. but dishonestly kept for himself. He was charged under two counts, first, of embezzlement of the stated sums of money, and second of larceny as bailee under the recent statute (Punishment of Frauds Act, 1857, s. 4). Wightman J., after consulting Pollock C.B., held (a) that it was not embezzlement because the prisoner's service ended when the farm was given up and that no new service was created, and therefore the first count failed; [this establishes that the test applied was whether the man was acting as servant at the material time; for clearly H. obtained the money by virtue of his employment as collector]; and (b) that the second count failed because, since H. was not bound to hand over the particular cash which he received from his employer's debtors, he was not a bailee of the money. This last part of the judgment establishes that in the view of the court H. was entitled to merge with his own money the money he collected, and thus he became owner of the coins when he received them. That same fact would have negatived embezzlement even if H. had been acting as servant when he collected them.

It is on the words of section 17 of the Larceny Act, 1916, that, in the first place, the case of *R.* v. *Davenport* will be examined.

(*To be continued.*)

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[3] *e.g.*, the taxi-driver, *R.* v. *Solomons* [1909] 2 K.B. 980. In such cases it may be a misdemeanour under s. 20 (1) (iv) (*b*) if the servant fails to account to his master.

[4] The rule is the same in larceny: no man can be guilty of the felony of larceny by any use he may make of any object which had been passed into his ownership; see, for example, the judgment in *R.* v. *Pear* (1779) 1 Leach 212; *R.* v. *Williams* (1857) 7 Cox 355. And see *R.* v. *Walsh* (1812) R. & R. 215, which will be discussed in detail in a further article.

# The Road Traffic Act, 1956—
# A General Review

By Harold Cassel and Michael Havers
*Barristers-at-Law*

The sponsors of this legislation described it as dealing first of all with safety, secondly with congestion, and thirdly with the carriage by road of private parties. The Act certainly touches on all these subjects, and on others too, not in that or in any other order, but in so piecemeal and patchwork a way as to defy logical presentation on the one hand, or a clear understanding on the other.

Undoubtedly the boldest feature of the Act is the extension of the dangerous and careless driving provisions of the Road Traffic Act, 1930, to bicyclists and tricyclists, and the introduction of a new jay-walking offence (ss. 8, 14). The latter consists in the contravention by a pedestrian of a direction to stop given by a constable regulating traffic ; it is made a summary offence with a maximum fine of £10 for a first, and £25 for a subsequent conviction. New, too, is the offence of causing death by reckless or dangerous driving (s. 8) ; this is triable only at Assizes and is punishable with 5 years' imprisonment. If satisfied that the defendant's driving was dangerous, but not that it caused the death charged, the jury may return a verdict of guilty of dangerous driving. There is no power to find a defendant charged with manslaughter guilty of the new offence.

To be in charge of a vehicle whilst under the influence of drink or drugs, as opposed to driving or attempting to drive in that condition is to constitute a new and entirely separate offence (s. 9). It will be a defence to this new charge for a defendant to prove that at the time there was no likelihood of his driving whilst unfit to do so, and that he had not driven since he became unfit. This offence will be punishable on indictment with 6 months' imprisonment or a fine or both, on summary conviction with a £50 fine or 4 months' imprisonment for a first offence, increased to £100 or 4 months or both for a subsequent offence. There is power to disqualify on conviction for this offence, and such disqualification for a minimum of 12 months is obligatory in the case of a second or subsequent conviction unless there are " special reasons " for not doing so.

The introduction of these new offences has been coupled with an upward revision of the punishments for the old (s. 26). Dangerous driving and driving or attempting to drive under the influence of drink or drugs, will all be punishable on indictment with 2 years' imprisonment, and on summary conviction with a £100 fine and 4 or 6 months' imprisonment for a first or subsequent conviction respectively. Careless driving will be punishable with a £40 fine for a first offence and an £80 fine or 3 months' imprisonment for a subsequent offence. Pedestrian crossing offences will be punishable with fines of £10 or £25 for a first or subsequent conviction respectively (s. 46 (4) ). The disqualification which follows in the absence of " special reasons " a second or subsequent conviction of dangerous driving is to be for a minimum of 9 months unless more than 3 years have elapsed since the last previous conviction of dangerous driving (s. 26 (1) ).

There may be compared the scale of punishments laid down for bicyclists' offences (s. 11). For dangerous riding, on summary conviction, a £30 fine may be imposed for a first offence, and a £30 fine or 3 months' imprisonment for a subsequent offence. For careless riding, a £10 fine for a first offence, and a £20 fine for a subsequent offence. The Act makes plain that convictions for offences committed with motor-vehicles are not to be regarded as imposing liability to the increased punishment appropriate to second or subsequent offences by a court dealing with a bicyclist or tricyclist offender, or vice versa.

The power to order that a person convicted of driving or attempting to drive whilst under the influence of drink or drugs shall be disqualified until he has passed a driving test is new; so is the right of appeal, granted where appropriate, against a finding of no " special reasons " for not disqualifying (ss. 26 (4), 28).

Two anomalies in the law relating to disqualification are removed. First, a court is expressly empowered to suspend the operation of a disqualification, whether by order of the court or by virtue of a conviction, pending an appeal; and second, that time during which a disqualification is suspended is not to count against the period for which it was imposed (ss. 27, 28).

There has long been a limited power to examine vehicles; by this Act a virtually new organisation is to spring into being not only to examine and test vehicles, but also to issue " test certificates " that they comply with the statutory requirements as to construction and condition (ss. 1, 2). The user, or anyone who causes or permits the use, of a vehicle more than 10 years' old in respect of which no test certificate has been issued within the preceding 12 months commits a summary offence punishable with a £20 fine for a first offence and with a £50 fine or 3 months' imprisonment for a subsequent offence. This does not apply to public service vehicles adapted to carry 8 or more passengers, to tramcars or trolley vehicles, or to the use of other vehicles for such purposes as may be prescribed.

The next innovation is that the Minister of Transport and Civil Aviation may designate parking places on highways for which local authorities may make charges, but without liability for loss or damage to any vehicle or its contents. These parking places are to be introduced first in London and the scheme may be extended by order of the Minister to other parts of the country. In any case the Minister can designate a parking place only on the application of the local authority (s. 19).

There are to be " standard periods " presumably of short duration, for each parking place, for which an " initial " charge of a " standard amount " for that place will be payable. After the " standard period " has expired, an " excess charge " will become payable. A maximum period during which a vehicle may be left in the parking place may be prescribed. To measure the times of parking the institution of parking meters is authorised (s. 20).

The periods, the charges, the manner in which the vehicles shall stand in, or be driven in or out of these parking places are to be prescribed by regulations. All this is accompanied by a crop of new prohibitions and offences (s. 22). The driver, who is responsible for the payments (not his employer if he has one) commits an offence who fails to pay the initial or any excess charge, or drives in or out of a parking place, or stands his vehicle in it in a manner which does not comply with the order creating it, and so does anyone, driver or not, who contravenes any other requirement of the order. In either case the maximum fine is £5 on a first, and £10 on a subsequent conviction. The " benefit of the doubt " is given to the parking meter, which is presumed to conform to the regulations.

The principal changes in relation to the carriage by road of private parties are extensions of their exemption from licensing controls. If adapted to carry less than 8 passengers a vehicle will be altogether relieved from control on any journey if the passengers were all outside Great Britain at the time of concluding arrangements for it (s. 40, Sched. 6). Otherwise the principal change is that the prohibition against previous advertisement of an exempted journey will not apply to notices or announcements in church or chapel, or in local church periodicals.

To complete this survey of the Act, in which only the more noticeable provisions have found mention, it remains to state that the Act, or any part of it, is to be brought into operation by order of the Minister.[1]

# *The Female Prostitute*

By REX COWAN, *Solicitor*

### Definition and extent of prostitution

The legal definition of prostitution, which will be considered later, is a restricted one, and differs in England from that in other countries. Prostitution may be defined according to the Shorter Oxford English Dictionary as, " the offering of the body to indiscriminate lewdness for hire." The essential elements in professional prostitution are the absence of the personality factor in the selection of the male partner and the money payment. Although here in this short survey we are only concerned with the professional who sells her body for money, the division between this class and the legions of amateurs, good time girls, gold diggers, and nymphomaniacs is only a quantitative one. A truly comprehensive study of prostitution would never be complete if it ignored the parallel problem of promiscuity in the female.

One of the many objections to prostitution is that it is a social evil, degrading to human dignity and corruptive to other human beings. How far this is true is a matter of individual cultures in different countries. The Geisha girl in Japan has an entirely different status from that of her English sister in Piccadilly. But those who, convinced of this evil, urge more repressive measures to deal with prostitution might profitably take note of Lombroso's warning that " prostitution largely takes the place of crime in women." A recent sociological survey published in England entitled " Women of the Streets " indicates that the incidence of crimes (unconnected with prostitution) dropped to negligible proportions when the women concerned became professional prostitutes. Where prostitution is organised, however, the position is much more serious, as the existence of criminal syndicates centred on prostitution encourages and promotes other criminal practices. The law in England relating to prostitution will be considered in a later article. It will suffice to record here that the measures applied to prostitutes are almost exclusively punitive, *i.e.*, it is the fine and imprisonment and not probation that are used in cases of adult offenders. It is time we realised that if we wish to control or eradicate prostitution we cannot beat it out, but must resort to more effective measures. To do so necessitates a greater understanding of the prostitute and the causes of prostitution.

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[1] The Act will be considered in detail in two further articles.

It is not practically feasible for obvious reasons to calculate the number of professional prostitutes in England.[1] The annual criminal statistics show approximately 11,000 convictions in 1953 for soliciting and offences under the Vagrancy Act, but without knowing how many individual women were involved, or how rigidly the laws are enforced, it would be dangerous to estimate from these figures. Similarly, without ascertaining a number of other relevant factors, no good purpose is served by pointing to the considerable increase since 1930 in the published numbers of arrests and convictions. One police officer in the West End of London is quoted by C. R. Hewitt in a lecture given in 1951 as having estimated the number of prostitutes in the West End as 3,000. It is unlikely, here taking the annual statistics as a very rough guide, that there are more than that number in the entire London area. Although prostitutes exist in most of the larger cities of England, the vast majority ply their trade in London, mainly in the Metropolitan areas, although some have been known to operate in the suburbs.

## The psychology of the prostitute

### *Study and research on prostitution—its scarcity*

It is interesting to note the scarcity of objective research and investigation into the etiology of prostitution. Admittedly, there have been a few social studies of the prostitute, her social milieu, her habits and her criminal record, but these are mainly of a classificatory nature and tell us little of what makes a woman a prostitute, and why she remains in her profession in spite of the considerable social taboo that is attached thereto. The resistance to genuine study is characterised by periodic eruptions often of a vituperative and hostile nature urging greater repressive measures in dealing with prostitutes. Whilst to a certain extent moral condemnation of prostitution is understandable, the reaction is often disproportionate to the social evil caused by it. The need of some men and women to push the problem into the background arises as a result of unconscious primitive tendencies within themselves. In other words, the visible signs of prostitution stimulate their own concern. This may be a simplification of the problem, and does not mean that all those who take this attitude towards prostitution have this motivation, but nevertheless the result has been that nothing constructive has been done about the situation; and the problem still remains with us. It is to be hoped that the report of the Committee on Prostitution and Homosexuality when published will give some help in this respect. There is another reason for the absence of adequate clinical research data. The prostitute is a very difficult person to treat psychiatrically. Progress is short-lived because she has no apparent conscious need or desire for help, and therefore unless she is kept in custody will retreat rapidly from psychiatric treatment.

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[1] But see H.C. Debates, Vol. 549, col. 59; February 23, 1956: [1956] Crim.L.R. 218, and see p. 588, above.

### *Psychological classification of prostitutes*

When considering the causative factors in either prostitution or promiscuity the interrelation of external social and internal psychological factors often obscures the picture; this is partly due to the fact that some social conditions, *e.g.*, economic, may precipitate a woman, so predisposed, into prostitution. It is a common theory that a woman becomes a prostitute to make an easy living and a quick fortune. Is this solely a sufficient explanation for a woman to engage in conduct to which is attached an unpleasant stigma and which ensures the ostracism of her by most of society (with the exception of course of her clients who may come from any strata of society)? Noticeably there are few wealthy prostitutes, although brothel keepers and " madams " often amass considerable fortunes. This is because the prostitute quickly rids herself, one way or the other, of her earnings. Interestingly enough, she frequently gives it away either to her manager (or pimp) or to friends. This then would seem inconsistent with an entirely financial or economic explanation. There is probably a deep rooted meaning and significance to the money transaction. With the present level of full employment in England, it is not likely, so long as this continues, that economic reasons will *precipitate* women into prostitution. Nevertheless a drop in the national economic situation might bring an increase in their numbers. What next follows is a brief psychological classification of the types of prostitutes found in most Western countries.

Quite a large proportion of prostitutes are mental defectives. The constitutional defect of a mental defective causes her to have an impaired social judgment and prevents her from understanding the full significance of the sexual act. She operates sexually on an infantile level and rationalises her behaviour by asserting that she entered prostitution to earn an easy living. This, in her case, probably has some validity as, due to her defect, economic opportunities are limited.

The number of psychotics is probably quite small, as this condition denotes a seriously disturbed and socially disorganised personality. Again there is a very infantile meaning attached to the sexual act, which is only of secondary importance, the primary gratification being obtained from the physical closeness with another human being.

Neurotics form by far the largest class. It would include also those who suffer from what is known as a character disturbance. For the neurotic the money transaction has a considerable symbolic significance. Her behaviour shows a masochistic and sadistic content, and the taking of money from her client is a part of her aggression, directed towards her client who often represents a transient father surrogate. Her early family history is characterised usually by bi-parental rejection ; that is to say, she has been abandoned, deserted or ill treated by *both* parents.

### *The prostitutes' client*

He generally falls into one of two categories. The inquisitive, curious adolescent, and the emotionally disturbed adult. The adolescent uses the prostitute in an attempt to solve his developing sexual tendencies. The latter category consists of men who usually have a pronounced tendency to see women either as all good or all bad. Good women are kept for marriage, and bad for illicit intercourse. The prostitute is available for the release of his own physical tensions ; there will be no emotional involvement, and he assuages his guilt by paying her the sum that she asks.

### *Prospects for treatment*

Domiciliary psychiatric treatment is not particularly successful, as it is dependent upon the ability of the patient to form a close relationship with the therapist. Most prostitutes suffer from a fear of forming close relationships with anyone. The prospect of even a therapeutic relationship causes her acute anxiety, and a strong desire to withdraw from treatment.

Treatment of the first two groups, the mental defectives and the psychotics, is extremely difficult as they lack the ability to develop insight into their behaviour and personality. The prognosis for the neurotic prostitute is much more favourable. To achieve any degree of success, the patient would need to be kept in custody during the initial stages of treatment.

# *Practice and Procedure*

## Assizes

*Disagreement of jury as to whether accused fit to plead*

Under the Criminal Lunatics Act, 1800, if any person indicted for any offence is insane and upon arraignment is found to be so by a jury impanelled for that purpose, he cannot be tried but is detained during the Queen's pleasure. An interesting point arose in the case of *R.* v. *Darkhu*, heard at Birmingham Assizes on July 12. The accused was charged with wounding with intent to murder. Before his plea was taken a jury was sworn to determine whether he was fit to plead. Evidence was given that the accused was suffering from paranoic schizophrenia. On this issue the jury disagreed: the question then arose as to whether a fresh jury should be sworn or whether, as the evidence had failed to satisfy the jury, the court should proceed to trial of the charge in the indictment. Counsel for the Crown submitted that the issue as to fitness to plead was one upon which a final decision must be taken. Finnemore J. held that the jury should be discharged and a fresh jury sworn to try the preliminary issue.

[R. JOHN TOYN, *Barrister-at-Law*.]

# *Summary Justice*

*Children*

Accepting rags from children under fourteen years of age and giving them ball point pens in exchange; fined £3; Heath: Gloucester City Magistrates' Court (*The Citizen*, July 28).

Boy, aged eleven, sent to an approved school by a juvenile court for his first offence, freed and put on probation on appeal: Bedfordshire Quarter Sessions (*The Daily Telegraph*, July 24).

*Damage*

Tree. Cutting three sprays of lilac from a tree on National Trust parkland in such a way as probably to cause the death of tree;

fined £2; Parkinson: Manchester County Magistrates' Court (*Liverpool Echo*, July 8).

Twenty-four boys and a girl, aged between eight and sixteen, causing £126 17s. 6d. worth of damage to a farmhouse; fifteen boys over the age of twelve ordered to report to an attendance centre for twelve hours, seven of the other boys fined £2 each, and two boys and the girl fined £1 each: Nottingham Juvenile Court (*Manchester Guardian*, July 10).

### *Housing*

Landlords failing to supply tenants with either a rent book stating the name and address of the Medical Officer of Health or some form of written statement supplying the necessary information as required by the Housing Act, 1936; two each fined a total of £7 10s. on five summonses, one fined total of £10 10s. on eight summonses, another £15 on ten summonses; all ordered to pay costs: Mohammed Ali, Ayub Kahn, Mawas Kahn, Abraham Kahn: Birmingham Magistrates' Court (*Birmingham Mail*, July 13).

### *Mines*

Explosives. Two men contravening Coal Mines (Explosives) Order, 1951; first removing detonator from case when it was not required for immediate use, failing to retain key of case in his possession and failing to retain removable handle from shot-firing apparatus in his possession; second, coupling shot-firing cable to the apparatus, firing shot in the mine and being in possession of detonator; each fined a total of £6; Harvey, Clarke: West Bromwich Magistrates' Court (*Birmingham Mail*, July 2).

### *Nuisance*

Bus. Making excessive noise by singing on a corporation trolley bus; fined £2; Tunstall: St. Helens Magistrates' Court (*Liverpool Echo*, July 31).

### *Railways and ships*

Ship. Allowing oil to escape from vessel into dock; owners fined £25; Pool Shipping Co. Ltd.: Liverpool Stipendiary Magistrates' Court (*Liverpool Echo*, July 17).

*Road traffic*

Queensway tunnel. Motor-cycle crossing from the fast lane to the slow lane and back again in the tunnel so as to overtake goods vehicle; fined £2; Finley: Birkenhead Magistrates' Court (*Liverpool Echo,* July 6).

School crossing. Failing to stop car when so required by a school crossing patrol and showing lack of consideration for other road users; fined £10 on first charge, £5 on second; Payne: Sutton Coldfield Magistrates' Court (*Birmingham Mail,* July 3).

Failing to show reasonable consideration for other road users; man trying to get past road barriers by driving his car on the footpath, trapping leg of person attempting to stop him; fined £5, licence endorsed; McKay: Birmingham Magistrates' Court (*Birmingham Mail,* July 13).

Driving while disqualified. Driving a motor-vehicle while licensed as a provisional licence holder to drive a motor-cycle only; fined £5, disqualified from driving for three months; Tewey: St. Helens Magistrates' Court (*Liverpool Echo,* July 23).

Being drunk in charge of a bicycle; fined £2; McCarroll: Chester City Magistrates' Court (*Liverpool Echo*, July 5).

# Case and Comment

The reports of cases to which initials are appended hereunder have been specially prepared for *The Criminal Law Review* by the following reporters:—

HENRY PALMER, *Barrister-at-Law*
J. D. PENNINGTON, *Barrister-at-Law*

### **Children and Young Persons**—*Child in need of care and protection —failure to attend school*

*Re* CALLENDER [1-2] (Q.B. Divisional Court: Lord Goddard C.J., Ormerod and Donovan JJ.: June 22, 1956) (*The Times*, June 23, 1956).

The mother of a child aged 14, normally resident in Kent, was offered temporary accommodation by a friend at Kingston-on-Thames when her house in Kent was burnt down. Shortly after

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[1-2] For the applicant: *Paul Sieghart* (instructed by Theodore Goddard & Co.). For the respondent: *L. G. Scarman* (instructed by W. W. Ruff, Kingston-on-Thames).

their arrival in Kingston the mother was visited by a school attendance officer, an inspector of the N.S.P.C.C. and a children's officer. There was no suggestion that the child was being ill-treated or that she was out of control, but she had not been to school for some three weeks. The child was removed from the house and brought before a juvenile court who ordered that the child be detained until July 5 in a children's home under section 67 (2) of the Children and Young Persons Act, 1933, as being in need of care and protection within section 61 (1). On an application by the mother for a writ of habeas corpus directed to the matron of the home:—

*Held*, that under the Act of 1933 the children's officer should have reasonable grounds for instituting proceedings. The fact that the child was not going to school was not a sufficient ground, the remedy in such a case being to proceed against the parent. Accordingly, the justices' court had acted without jurisdiction and the child should be released.

*Per* Lord Goddard C.J.: He desired to repeat what he had said in *R.* v. *Board of Control, ex p. Rutty* [1956] Crim.L.R. 331—the mere fact that officials, or doctors, or anyone else, thought that it would be good for a child or young person, or any other person, to receive treatment, was no ground for putting into operation the procedure of the Children and Young Persons Act, 1933, or of the Mental Deficiency Acts, or that of any other Act. [J. D. P.]

COMMENTARY. When this case came before the Kingston (Surrey) Juvenile Court on July 5 the proceedings were adjourned *sine die*. The fact that the girl was released on a writ of habeas corpus did not affect the order made by the juvenile court and proceedings are pending in the Divisional Court for an order of certiorari against the justices (see *The Manchester Guardian*, July 6, 1956).

Section 61 (1) of the Children and Young Persons Act, 1933, defines a child or young person in need of care or protection as a person who " having no parent or guardian or a parent or guardian unfit to exercise care and guardianship or not exercising proper care and guardianship, is either falling into bad associations, or exposed to moral danger, or beyond control or is ill-treated or neglected in a manner likely to cause him unnecessary suffering or injury to health "; or a person in respect of whom certain offences have been committed, or who is a member of the same household as a child in respect of whom such offences have been committed; or a child or young person in respect of whom an offence has been committed under section 10 of the Act of 1933, which relates to the punishment of vagrants preventing children or young persons from receiving education. A vagrant under section 10 is a person " who habitually wanders from place to place," a description which does not apply to the mother in the present case.

Section 36 of the Education Act, 1944, imposes on every parent of a child of compulsory school age the duty of ensuring that the child receives an "efficient full-time education." Under section 37 a local education authority may serve a notice on a parent in its area who it appears is not observing this duty, requiring him to satisfy the authority that he is doing so. If he does not, then the authority may, subject to prescribed conditions, serve on him a school attendance order requiring the child to become a registered pupil at a named school. A parent failing to comply with such an order is guilty of an offence. The court before whom a prosecution for such an offence is brought may direct that the child be brought before a juvenile court where he may be dealt with as being in need of care and protection (s. 40 (3A) ).

For the numbers of children committed to approved schools under section 62 (1) of the Children and Young Persons Act, 1933, and section 40 (3) of the Education Act, 1944, see H.C. Debates, Vol. 555, col. *128*; July 5, 1956.

A Departmental Committee is to consider the working of the law in England and Wales relating to proceedings and the powers of the courts in respect of juveniles brought before them as being in need of care and protection: see [1956] Crim.L.R. 514.

### **Court of Criminal Appeal**—*Application for leave to appeal—conviction quashed at hearing of application*

R. *v*. HUTCHINSON [3] (Court of Criminal Appeal: Lord Goddard C.J., Ormerod and Ashworth JJ.: July 24, 1956).

H. was convicted at Lancashire Quarter Sessions of larceny and was sentenced to twelve months' imprisonment. The offence alleged was stealing scrap motor-car tyres, and H.'s defence was that he had bought the tyres. H. applied to the Court of Criminal Appeal for leave to appeal against his conviction on the main ground that his defence was not adequately put to the jury.

*Held*, that H.'s defence was never put to the jury at all, and the conviction could not possibly be allowed to stand. Instead of giving leave to appeal and quashing the conviction at a subsequent hearing, the conviction would be quashed now. That course had probably never been taken before, although it was quite common in the case of sentence appeals to give leave to appeal and to reduce the sentence at the same hearing. [H. P.]

COMMENTARY. A person may appeal to the Court of Criminal Appeal against his conviction as of right where the ground of his appeal involves a question of law alone, but where it involves a question of fact alone or a question of mixed law and fact, or where the ground of his appeal is some other one which the court considers sufficient, he may appeal only with the leave of the Court of Criminal Appeal or upon the certificate of the judge who tried him. An appeal against sentence may only be made by leave of the Court of Criminal Appeal (Criminal Appeal Act, 1907, s. 3). The power to give leave to appeal may be exercised by any judge of the court in the same manner as it may be exercised by the court (s. 17). Appeals against sentence are more numerous than those against conviction, and the practice of dealing with them on application for leave to appeal saves both expense and the time of the court.

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[3] The applicant did not appear and was not represented. The Crown was not represented.

An inadequate summing-up may be a ground for quashing a conviction: *R.* v. *Breed* (1931) 22 Cr.App.R. 166. In *R.* v. *Bridgland* [1956] Crim.L.R. 346 the Court of Criminal Appeal quashed a conviction because the defendant's case had never been put properly to the jury.

### **Courts-Martial**—*Petition for the quashing of conviction out of time—extension of time*

R. *v.* LACEY[4] (Courts-Martial Appeal Court: Lord Goddard C.J., Ormerod and Ashworth JJ.: July 24, 1956).

L., a senior aircraftman, was convicted and sentenced before a court-martial at Lichfield for obtaining money by false pretences. He presented his petition to the Air Ministry two days after the prescribed time. The Air Ministry refused to accept the petition and the matter was brought before the Courts-Martial Appeal Court in order that it might consider the question of extending the time for presenting a petition.

*Held*, that under the Courts-Martial (Appeals) Act, 1951, it was a condition precedent to an application to the court for leave to appeal that the person convicted (except in the case of a conviction involving sentence of death) should have presented to the appropriate authority a petition praying that his conviction be quashed. The time prescribed by the Rules was, in the case of a conviction by an army or air-force court-martial (i) 40 days next following that on which the finding of the court-martial was promulgated, if the court-martial was held in the United Kingdom; and (ii) 60 days next following that on which the finding of the court-martial was promulgated in any other case. There was no question but that in this case the petition was presented two days out of time, and there was no provision either in the Act or in the Rules for extending the time. Accordingly, L. was unable to apply for leave to appeal and the Air Ministry were right in refusing the petition. [H. P.]

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[4] The applicant did not appear and was not represented. The Crown was not represented.

COMMENTARY. The Courts-Martial Appeal Court was created by the Courts-Martial (Appeals) Act, 1951, and its jurisdiction and powers are governed by that Act and the Rules made under it.

### **Evidence** — *Admissibility — statements made to the accused by persons not called as witnesses*

SUBRAMANIAM *v.* PUBLIC PROSECUTOR[5] (Judicial Committee of the Privy Council: Lords Radcliffe and Tucker and Mr. L. M. D. de Silva: July 9, 1956) ([1956] 1 W.L.R. 965).

The appellant was found in a wounded condition in the State of Johore by members of the security forces operating against terrorists. When he was searched twenty rounds of ammunition were found on him, but no weapon. On a charge of possessing ammunition contrary to the Malayan Emergency Regulations, 1951, the appellant put forward the defence that he had been captured by terrorists and that he was acting under duress and that at the time of his apprehension by the security forces he intended to surrender. The onus of proving duress was on the appellant. He sought to give evidence of what the terrorists said to him when he was captured by them, but the trial judge ruled that the evidence was inadmissible unless the terrorists were called. The appellant was convicted.

*Held* that, in ruling out the evidence of conversations between the terrorists and the appellant, the judge was in error. Evidence of a statement made to a witness by a person who was not himself called as a witness was not hearsay and was admissible when it was proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. In the present case statements could have been made to the appellant by the terrorists, which, whether true or not, if they had been believed by the appellant, might have induced in him an apprehension of instant death if he failed to conform to the terrorists' wishes. The appellant's version of the conversations, if believed, could have afforded cogent evidence of duress, which under the Malayan Penal Code would afford a defence. Accordingly, the appeal should be allowed. [J. D. P.]

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[5] For the appellant: *Dingle Foot Q.C., R. K. Handoo* (instructed by Stanley Johnson & Allen). For the respondent: *D. A. Grant* (instructed by Charles Russell & Co.).

COMMENTARY. Regulation 4 of the Malayan Emergency Regulations, 1951, provides: "(1) Any person who without lawful excuse, the onus of proving which shall be on such person, carries or has in his possession or under his control—(*a*) any firearm, without lawful authority therefor; or (*b*) any ammunition or explosive without lawful authority therefor, shall be guilty of an offence and shall on conviction be punished with death."

The meaning of "lawful excuse" in this regulation was considered in *Wong Pooh Yin* v. *Public Prosecutor* [1954] Crim.L.R. 789. The Privy Council considered it undesirable to attempt to define the expression in a comprehensive manner, and that each case should be examined on its individual facts. They did, however, reach two general conclusions: first, that the term "lawful excuse" is of wider import than that of "lawful authority," and secondly, that the regulation does not call for any special intent on the part of the accused.

In *R.* v. *Steane* [1947] K.B. 997 at 1005 Lord Goddard C.J. defined duress as "a matter of defence where a prisoner is forced by fear of violence or imprisonment to do an act which in itself is criminal." He went on to say: "There is very little learning to be found in any of the books or cases on the subject of duress and it is by no means certain how far the doctrine extends." In *R.* v. *Steane* a man charged with doing an act likely to assist the enemy stated that he had done so under the pressure of threats and assaults and with a view to saving his family from a concentration camp. It does not appear from the report that any evidence other than that of the defendant was given of the duress under which he claimed he acted.

The criminal jurisdiction of the Privy Council is a narrow one. In *Muhammad Nawaz* v. *King-Emperor* (1941) L.R. 68 I.A. 126 Viscount Simon L.C. said: "Broadly speaking, the Judicial Committee will only interfere where there has been an infringement of the essential principles of justice. An obvious example would be a conviction following a trial where it could be seriously contended that there was a refusal to hear the case of the accused, or where the trial took place in his absence, or where he was not allowed to call relevant witnesses." It is for the appellant to satisfy the Board that a real miscarriage of justice has occurred.

As to hearsay evidence, see Phipson on *Evidence*, 9th ed., Chap. 16.

### **Evidence**—*Witness—previous inconsistent statement—statement not evidence against accused*

R. *v.* ALLPRESS [6] (Court of Criminal Appeal: Lord Goddard C.J., Ormerod and Donovan JJ.: July 9, 1956) (*The Times*, July 10, 1956).

A. was convicted at the Central Criminal Court of receiving

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[6] For the appellant: *Victor Durand* (instructed by Edward Fail & Co.). For the Crown: *Roger Frisby* (instructed by the Solicitor, Metropolitan Police).

£2,450, part of the proceeds of a robbery from bank messengers, and was sentenced to six years' imprisonment. The robbery took place on December 21, 1955, and on December 30 the police visited the house of A.'s sister where they found the money in a boot box on top of a cupboard. There was evidence that the box had contained shoes sold to A. A.'s sister subsequently was charged with receiving money and made an unsworn written statement to the police in which she said that A. had brought the box to the house, but when she gave evidence at the trial she said that she knew nothing whatever about the box. The written statement was put to her. A. himself did not give evidence. A. appealed to the Court of Criminal Appeal against his conviction on the ground that the learned Recorder misdirected the jury by treating the written statement of A.'s sister as evidence against A.

*Held*, dismissing the appeal, that the unsworn written statement of A.'s sister could properly be put to her for the purpose of discrediting her and showing that she was an untruthful witness, but the learned Recorder wrongly treated the statement as evidence against A. However, the court were of opinion that no substantial miscarriage of justice had occurred in this case and that there was sufficient evidence to uphold the verdict. No explanation was given by A. and, in the circumstances, it was clearly a case where the proviso to section 4 (1) of the Criminal Appeal Act, 1907, should be applied and, accordingly, the appeal would be dismissed. [H. P.]

COMMENTARY. This case follows *R.* v. *Dibble* (1908) 1 Cr.App.R. 155, *R.* v. *White* (1922) 17 Cr.App.R. 60 and *R.* v. *Harris* (1927) 20 Cr.App.R. 144. In the latter case a man was convicted of incest with his daughter. At the trial the daughter denied that her father had acted improperly towards her at any time and a previous statement that the daughter had made to the police to the effect that the father had had connection with her was put in. Dismissing the father's appeal, the Court of Criminal Appeal held " that the learned judge directed the jury in the proper way, namely, that the effect of the previous statement, taken together with the sworn statement, was to render the girl a negligible witness, and that the jury must consider whether the case was otherwise and by others made out."

In all three of these cases it had been proved under section 3 of the Criminal Procedure Act, 1865, that the witness concerned had made a previous statement inconsistent with his or her testimony at the trial. Section 3 provides that a party producing a witness may, in case a witness shall, in the opinion of the judge, prove adverse, by leave of the judge prove that that witness had made at other times a statement inconsistent with his present testimony. The circumstances of the supposed statement must be mentioned to the witness and he must be asked whether or not he has made such a statement. Adverse in this context means hostile, and not merely unfavourable: *Greenough* v. *Eccles* (1859) 5 C.B.(N.S.) 786. Whether a witness should be treated as hostile is a matter within the discretion of the judge and only in exceptional circumstances would the court allow an appeal against the judge's decision: *R.* v. *Williams* (1913) 8 Cr.App.R. 133. In *R.* v. *James* [1954] Crim.L.R. 55, where a girl gave evidence at the trial of her father for incest contradicting a previous statement she had made, Cassels J. held that by reason of her change of story the girl had shown herself to be adverse within the meaning of section 3.

See Archbold, 33rd ed., 518.

**Extradition**—*Fugitive offender—habeas corpus—delay in bringing proceedings*

R. *v.* GOVERNOR OF BRIXTON PRISON, *ex p.* CAMPBELL [7] (Q.B. Divisional Court: Lord Goddard C.J., Ormerod and Donovan JJ.: July 11, 1956) (*The Times*, July 12, 1956).

In May, 1956, C. was committed to prison by the Bow Street magistrate under the Fugitive Offenders Act, 1881, to await her return to Jamaica on charges of embezzlement alleged to have been committed there between September, 1948, and July, 1951. C. had left Jamaica in 1951 and had been in this country ever since. On an application for a writ of habeas corpus,

*Held* that, in view of the long delay in bringing proceedings, which had not been satisfactorily explained, the applicant's chances of defending herself would be prejudiced and, in the circumstances, it would be unjust to order her return. Accordingly, by virtue of section 10 of the Act of 1881 the court would order her discharge. [J. D. P.]

COMMENTARY. Section 10 of the Fugitive Offenders Act provides: " Where it is made to appear to a superior court that by reason of the trivial nature of the case, or by reason of the application for the return of a fugitive not being made in good faith in the interests of justice or otherwise, it would, having regard to the distance to the facilities for communication, and to all the circumstances of the case, be unjust or oppressive or too severe a punishment to return the fugitive . . . such court may discharge the fugitive. . . ."

The words " or otherwise " in this section have raised some doubts as to the extent of the superior court's discretion to discharge a fugitive. In *R.* v. *Governor of Brixton Prison, ex p. Waite, The Times*, February 22, 1921, the Attorney-General submitted that " the words ' or otherwise '

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[7] For the applicant: *Harry Lester* (instructed by F. Henry Pierre). For the Colonial Office: *John Mathew* (instructed by Charles Russell & Co.). For the Director of Public Prosecutions: *E. J. P. Cussen* (instructed by Director of Public Prosecutions).

. . . leave it to the discretion of the court to make the order in any case upon any ground where, having regard to the distance, and the facilities for communication, and to all the circumstances of the case, it appears to the court that it would be oppressive, or too severe a punishment, to return the fugitive immediately." *Re Henderson* [1950] 1 All E.R. 283 was a case dealt with on this basis. An order was made in 1949 for the return of the applicant to India to answer charges made in 1944 of cheating and dishonestly inducing the delivery of property. The Court of Appeal refused to discharge the applicant, because, although there had been great delay, there was no evidence that the applicant would not obtain justice at his trial and the charges against him were very serious. But Tucker L.J. said: " After all this delay, with this long distance, if it appeared to us that the charges were trivial and that the punishment entailed in being returned was in the circumstances out of all proportion to the gravity of the offence . . . this court would, no doubt, intervene." The Divisional Court refused to exercise its discretion under section 10 in *R.* v. *Governor of Brixton Prison, ex p. Green* [1955] Crim.L.R. 110, where it was contended that the gravity of the offence, stealing and forging a cheque, did not outweigh the cost of sending the offender back to Uganda, and in *Re Clemetson* [1956] Crim.L.R. 50, where an order had been made against a nurse from Jamaica accused of embezzling £6.

In *R.* v. *Brixton Prison Governor, ex p. McCheyne* [1951] 1 T.L.R. 1155 Lord Goddard C.J. said that the court's jurisdiction in this matter was one " which ought to be very carefully and very seldom exercised." That was a case, " of the rare and exceptional class," in which the court exercised its power and discharged the offender. The applicant, after embezzling money in South Africa, had been allowed to return to England by his employers, but later a warrant had been issued for his arrest.

### **Firearms**—*Cyprus—discharging and carrying firearms contrary to emergency regulations*

ZAKOS *v.* THE QUEEN[8] (Judicial Committee of the Privy Council: Viscount Simonds, Lords Oaksey, Tucker, Cohen and Somervell of Harrow: July 26, 1956) (*The Times*, July 27, 1956).

Two Cypriots were convicted of discharging and carrying firearms contrary to reg. 32 of the Emergency Powers (Public Safety and Order) Regulations, 1955, and sections 20 and 21 of the Cyprus Criminal Code, and sentenced to death. They appealed on the ground that sections 20 and 21 of the Code, which relate to aiding and abetting and common intention, had no application to the Regulations and that therefore they were charged with offences unknown to the law of Cyprus, since they were not found guilty themselves of discharging or carrying firearms and their offence lay in the application to their case of sections 20 and 21. Moreover section 2 (*a*) of the Criminal Code provided that "nothing in the Code shall affect the liability, trial or punishment of a person for an offence against any law in force in the Colony other than the Criminal Code."

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[8] For the appellants: *D. N. Pritt Q.C., D. A. Grant* (instructed by Bischoff & Co.). For the Crown: *Gerald Howard Q.C., J. G. Le Quesne* (instructed by Charles Russell & Co.).

*Held*, dismissing the appeal, that by virtue of reg. 2 (2) of the Regulations, which provided that the Regulations should be deemed to be laws, it was clear that the Code applied to the Regulations; that the operation of the Code was not excluded where it was not inconsistent with the Regulations, and that sections 20 and 21 had in no way been repealed by the Regulations. Accordingly, the appellants had been rightly convicted. [J. D. P.]

COMMENTARY. The decision in this case depended entirely on the construction of the Cyprus Criminal Code and the Emergency Regulations. Its importance lies in the fact that the proper construction of the Emergency Regulations is a matter of great moment in Cyprus at the present time. The powers given to ensure public order are very wide.

**Food and Drugs**—*Justice's order for destruction of meat unfit for human consumption—appeal—justice acting administratively*

R. *v*. CORNWALL QUARTER SESSIONS, *ex p*. KERLEY[9] (Q.B. Divisional Court: Lord Goddard C.J., Ormerod and Donovan JJ.: June 28, 1956) ([1956] 1 W.L.R. 906; [1956] 2 All E.R. 872).

A justice of the peace condemned a carcass of meat as being unfit for human consumption under section 10 (3) of the Food and Drugs Act, 1938, and ordered it to be destroyed. The owner of the carcass gave notice of appeal to quarter sessions against the justice's order. The local sanitary inspector applied for an order of prohibition to prohibit quarter sessions from hearing the appeal on the ground that the order was an executive order against which the owner had no right of appeal.

*Held*, granting prohibition, that a justice, when acting under section 10 (3) of the Act of 1938, was not acting judicially, but administratively and, accordingly, no appeal lay from his order. [J. D. P.]

COMMENTARY. In Paley on *Summary Convictions*, 10th ed., at p. 30, a threefold distinction, based on the judgment of Lord Brougham in

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[9] For the applicant: *Norman Skelhorn Q.C., A. L. Mildon* (instructed by Robbins, Olivey & Lake for Stephens & Scown, St. Austell). For the respondent: *Edmund Davies Q.C., J. B. Worsley* (instructed by Champion & Co. for Spencer, Gibson & Son, Sutton).

*Ferguson* v. *Earl of Kinnoul* (1842) 9 Cl. & Fin. 251 at 290, is drawn between (1) the judicial acts of magistrates properly so called involving a hearing and conclusive determination; (2) administrative acts, commonly styled ministerial, which are discretionary; and (3) ministerial acts, strictly so called, which are obligatory when once it is shown that the state of facts necessary to give jurisdiction exists. This distinction between judicial and administrative acts is not entirely satisfactory, since there may well be a hearing before a justice exercises an administrative function and his determination may well be conclusive as in the present case.

No appeal lies against the order of a magistrate unless the right to appeal is conferred by statute: *R.* v. *Warwickshire Justices* (1856) 25 L.J.M.C. 119. Section 88 of the Food and Drugs Act, now replaced by section 118 of the Food and Drugs Act, 1955, gave a right of appeal against any order made by a court of summary jurisdiction under the Act and so if the Divisional Court had decided in the present case that the justice was acting judicially there would have been a right of appeal. In *White* v. *Redfern* (1879) 5 Q.B.D. 15 it was held that under a provision of the Public Health Act, 1875, similar to section 10 of the Act of 1938, a justice was acting administratively. In *Waye* v. *Thompson* (1885) 15 Q.B.D. 342 it was held that where the possessor of meat which had been condemned by a justice was prosecuted for selling, or offering for sale, food unfit for human consumption, he was entitled to have the question of the soundness of the meat reheard.

Section 10 of the Act of 1938 is now replaced by section 9 of the Food and Drugs Act, 1955.

**Habeas Corpus**—*Detention of child failing to attend school.* See *Re* CALLENDER, p. 617, above.

**Habeas Corpus**—*Fugitive offender.* See R. *v.* GOVERNOR OF BRIXTON PRISON, *ex p.* CAMPBELL, p. 624, above.

**House of Lords**—*Appeal to—fiat of Attorney-General—mandamus*

*Ex p.* BLACKBURN [10] (Q.B. Divisional Court: Pilcher and Ashworth JJ.: July 20, 1956; Court of Appeal: Singleton, Morris and Romer L.JJ.: July 24, 1956) (*The Times*, July 21, 25, 1956).

On March 29, 1955, the Court of Criminal Appeal ([1955] Crim. L.R. 323) dismissed B.'s appeal against his conviction under the Prevention of Fraud (Investments) Act, 1939, made on the ground that the judge had failed properly to direct the jury as to the onus of proof. Two days later he applied to the Attorney-General under section 1 (6) of the Criminal Appeal Act, 1907, for a certificate to appeal to the House of Lords, which was refused. Subsequently, B. again applied to the Attorney-General for a certificate on the ground that since the dismissal of his appeal by the Court of Criminal Appeal, that court came to decisions in *R.* v. *Murtagh and Kennedy* [1955] Crim.L.R. 506 and *R.* v. *Hepworth* [1955] Crim. L.R. 576, which tended to show that their decision in his case was bad in law. The Attorney-General having refused to consider B.'s renewed application, B. applied to the Divisional Court for an order of mandamus which was refused. On appeal: —

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[10] The applicant appeared in person.

*Held*, dismissing the appeal, that B.'s second application was either the same as the one he had originally made or a fresh one; if it was a fresh one it was out of time by virtue of section 16 (1) of the Criminal Justice Act, 1925, being made more than seven days after the decision of the Court of Criminal Appeal; if it was the same application there was no reason for reading into section 1 (6) of the Act of 1907 an obligation on the Attorney-General to reconsider it. [J. D. P.]

COMMENTARY. Mandamus is a discretionary remedy and the question whether it should be granted is decided on the facts of each case. The present case was decided on the narrow grounds of the judgment. The wider question as to whether mandamus would ever lie against the Attorney-General in the exercise of his functions under section 1 (6) of the Criminal Appeal Act, 1907, was not in issue. In the Divisional Court Ashworth J. said that he assumed, but did not decide, that mandamus might lie on an original refusal to consider the application.

Although it may well seem that the appellant in this case has suffered an injustice, the decision of a court does not have retroactive effect in the sense that it affects cases previously decided; the later decisions of the Court of Criminal Appeal could not affect the dismissal of Mr. Blackburn's appeal.

Indirectly, particularly as the decision of the Attorney-General may not be subject to review, the case raises the question whether the present procedure for obtaining leave to appeal to the House of Lords is the best. We have questioned before (see [1955] Crim.L.R. 459) whether there is any good reason why the procedure should not be the same as that in civil cases. See also a letter of Sir Henry Slesser (formerly a Lord Justice) in *The Times*, July 25, 1956.

**Insanity**—*Refusal to plead.* See R. *v.* HOLLINGSWORTH, p. 633, below.

**Magistrates**—*Administrative order.* See R. *v.* CORNWALL QUARTER SESSIONS, *ex p.* KERLEY, p. 626, above.

### **Mines and Quarries**—*Manager—liability for offence committed in his absence—under-manager duly appointed*

BASSETT *v.* EVANS [11] (Q.B. Divisional Court: Lord Goddard C.J., Ormerod and Donovan JJ.: June 28, 1956) ([1956] 1 W.L.R. 925; [1956] 2 All E.R. 899).

The defendant was the manager of a coal mine and, as he was about to go on leave, an under-manager was appointed under section 3 (1) of the Coal Mines Act, 1911, to act as manager during the defendant's absence. While he was away an oxyacetylene burner was used in the mine to burn out some rings. The defendant was charged under sections 35 (1) and 75 of the Act with a contravention of the Act.

*Held* that, the under-manager having been properly appointed to act during the defendant's absence, the latter was not liable for a contravention of the Act and had taken all reasonable steps to prevent such a contravention. Accordingly, he was not guilty of the charge against him. [J. D. P.]

COMMENTARY. Under section 75 of the Coal Mines Act, 1911, in event of any contravention of or non-compliance with the safety provisions contained in Part II of the Act (such as that prohibiting matches, etc., contained in section 35) the manager is guilty of an offence unless he proves that he had taken " all reasonable means by publishing and to the best of his power enforcing those provisions to prevent that contravention or non-compliance." Whether or not a manager falls within this exception depends on the facts of each case, but liability under the section is wide. In *Atkinson* v. *Morgan* [1915] 3 K.B. 23 it was held that a manager who had appointed a competent fireman had not taken all reasonable means of ensuring that a mine was properly ventilated. Under a similar provision contained in the Coal Mines Regulation Act, 1872, s. 51, it was held that a manager was liable who had omitted to employ the resources at his disposal for the improvement of the ventilation of the mine: *Hall* v. *Hopwood* (1879) 49 L.J.M.C. 17.

### **National Service**—*Liability to serve—Jehovah's witness not regular minister of religious denomination*

WALSH *v.* LORD ADVOCATE [12] (House of Lords: Lords Morton of Henryton, Goddard, MacDermott, Keith of Avonholm and Somervell of Harrow: July 19, 1956) ([1956] 1 W.L.R. 1002; [1956] 3 All E.R. 129).

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[11] For the defendant: *Edmund Davies Q.C., Alun T. Davies* (instructed by Sharpe, Pritchard & Co. for T. D. Windsor, Williams, Neath). For the prosecutor: *Rodger Winn* (instructed by the Treasury Solicitor).

[12] For the appellant: *Sir Lynn Ungoed-Thomas Q.C., S. H. Noakes, G. C. Emslie* (instructed by Gouldens for Scott & Glover, W. S., Edinburgh, and Burns, Reid & Tilson, Glasgow). For the Ministry: *Lord Advocate Milligan, Harold Leslie Q.C., Manuel Kissen Q.C.* (instructed by Solicitor, Ministry of Labour and National Service, for Macpherson & Mackay, W. S., Edinburgh).

The appellant held the offices of " pioneer publisher " and " congregation servant " in the body known as Jehovah's Witnesses. In 1953 he was required by the Ministry of Labour and National Service to submit himself to medical examination under section 8 (1) of the National Service Act, 1948. In an action for a declaration that the appellant was not liable to national service:—

*Held*, affirming the decision of the Court of Session, that none of the posts contained in the organisation of Jehovah's Witnesses were of such a kind as to bring the holder within the description of " a regular minister of a religious denomination " within para. 2 of Sched. I of the Act of 1948, and, accordingly, the appellant was not exempt from national service.

*Per* Lord Goddard. It is the spiritual or pastoral status and not the performance of functions that gives the right to exemption from military service. [J. D. P.]

COMMENTARY. Under para. 2 of Schedule 1 of the National Service Act, 1948, " a man in holy orders or a regular minister of any religious denomination " is exempted from military service. One of the difficulties arising in the case of Jehovah's Witnesses is that each one on baptism becomes commissioned to preach the gospel and is required to devote his life, except such time as is occupied in the discharge of family responsibilities, in so preaching.

In construing this exemption from military service two distinct questions arise. Is the person concerned a " regular minister " and is the body to which he belongs a " religious denomination "? In the present case it was assumed that Jehovah's Witnesses formed such a denomination. In *Kipps* v. *Lane* (1917) 33 T.L.R. 207, where an elder of a church of the International Bible Students' Association was held not to fall within a similar exception contained in the Military Service Act, 1916, Lord Reading C.J. refused to define the meaning of the term " regular minister," but suggested that such a minister should have the exclusive privilege or duty to conduct services and have undergone special training. In *Kick* v. *Donne* (1917) 33 T.L.R. 325 the Divisional Court upheld the decision of justices that a body of about fifty persons was too small to be considered a " religious denomination " within the meaning of the Act of 1916.

This decision does not affect the right of Jehovah's Witnesses to register as conscientious objectors under section 17 of the Act of 1948.

See Stroud's *Judicial Dictionary,* 3rd ed., Vol. 3, 1800, 2513.

**Police**—*Wages paid to injured policeman—recovery from person liable for injury*

MONMOUTHSHIRE COUNTY COUNCIL *v.* SMITH[13] (Monmouthshire Assizes: Lynskey J.: June 15, 1956) ([1956] 2 All E.R. 800).

In December, 1952, a police constable was certified unfit for duty following injuries received owing to the negligence of the defendant and was given sick leave until February, 1953, when he returned to light duties. In July, 1954, he was again unfit and in December, 1954, he was compulsorily retired on a pension. He received from the plaintiffs as police authority full salary and allowances from December, 1952, to December, 1954. In February, 1956, the constable recovered damages from the defendant. These damages did not include loss of wages, and the right to a pension was taken into account. The plaintiffs now claimed £751 8s. made up as follows: (1) reimbursement of full pay and allowances from December, 1952, to February, 1953, and July, 1954, to December, 1954; (2) house allowance during sick leave; (3) reimbursement of half pay while on light duties; (4) half the rent of the house during that period on the basis that the constable's services then were worth only half as much to the plaintiffs; (5) pension paid on retirement until judgment in the constable's favour against the defendant; and (6) police doctor's fee in connection with the constable's disability.

*Held* that, as none of the sums claimed by the plaintiffs could have been recovered by the constable from the defendant, since the constable had suffered no loss, and as the plaintiffs were not entitled to sue the defendant in respect of the loss of the constable's services, the plaintiffs' claim failed. [J. D. P.]

COMMENTARY. Although he considered *Metropolitan Police District Receiver* v. *Croydon Corporation* [1956] Crim.L.R. 567, Lynskey J. reached a decision opposite to that of Slade J. in the earlier case. Both judges accepted the principle that " where the plaintiff has been compelled by law to pay, or, being compellable by law, has paid money which the defendant was ultimately liable to pay, so that the latter obtains the benefit of the payment by the discharge of his liability; under such circumstances the defendant is held indebted to the plaintiff in the amount " (see Leake on *Contracts*, 8th ed. at p. 41). The difference between them was that Lynskey J. thought that the principle did not apply to the case before him, while Slade J. thought it did. Lynskey J. considered that as the county council, as police authority, had to pay the constable, the defendant was never liable to pay him, while Slade J. went further and reasoned that, although the Receiver had by law to pay the constable, if this were not so, the constable could and would have recovered his wages from the defendants in an action brought against them.

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[13] For the plaintiffs: *J. Bussé Q.C., R. C. Hutton* (instructed by Vernon Lawrence, Newport, Mon.). For the defendant: *R. G. Micklethwait Q.C., C. N. Pitchford* (instructed by Myer Cohen & Co., Cardiff).

We understand that appeals have been lodged in both cases.

**Road Traffic**—*Insurance—driving while uninsured—insurance obtained by false statements*

Durrant v. Maclaren [14] (Q.B. Divisional Court: Lord Goddard C.J., Ormerod and Donovan JJ.: July 11, 1956) (*The Times*, July 12, 1956).

The defendant, when hiring a car, filled in a form, headed "Personal Insurance Proposal" in order to obtain insurance cover. To the questions whether he had been refused renewal of a policy or had had an accident within the past three years, he falsely answered "No." He was subsequently involved in an accident while driving the hired car. The defendant was charged under section 35 of the Road Traffic Act, 1930, with using a car without having in force a third-party policy of insurance. The justices dismissed the information. On appeal:—

*Held*, that the effect of section 10 of the Road Traffic Act, 1934, was that if a person was injured an insurer who had delivered a certificate of insurance, although he might have the right to avoid the policy, was nevertheless liable to pay the injured person unless the insurer took steps to avoid the policy. In the present case, at the time when the defendant was prosecuted no steps had been taken to avoid the policy and the insurer remained liable to indemnify third parties. Accordingly, the defendant was not guilty of the offence charged.

*Per* Lord Goddard C.J. It was a great misfortune that the defendant had not been prosecuted under section 112 (2) of the Act of 1930 for making a false statement to obtain insurance. In such a scandalous case it was to be hoped that the justices would have sent him to prison. If he did it again he ought to be sentenced to the full six months and be fined as well. [J. D. P.]

Commentary. This case illustrates the importance of prosecuting a person for the correct offence. Although a longer term of imprisonment may be imposed under section 112 (2) of the Road Traffic Act, 1930 (six months instead of three), the punishment under section 35 is more severe in that the offender is subject to disqualification from driving.

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[14] For the prosecutor: *R. D. L. du Cann* (instructed by Wontner & Sons). For the defendant: *J. B. Castleman* (instructed by Amery-Parkes & Co.).

In holding that an insurance policy is valid under section 35, although the insurers may have a right to avoid it, the court was following the same principle as was applied in *Goodbarne* v. *Buck* [1939] 4 All E.R. 107. In that case a policy was issued upon a proposal form containing false statements. Some months later in an action instituted by the insurance company, the policy was declared avoided. Hilbery J. held that until the policy was declared avoided there was in force a valid insurance for the purposes of section 35. He based his decision on the fact that the policy was a voidable one, but in the present case Lord Goddard C.J. said that he thought it made no difference whether the policy was void or voidable. The principal reason for decisions such as these and that in *Police* v. *Bishop* [1956] Crim.L.R. 569 is the necessity of protecting third parties.

### **Sending Threatening Letters**—*Certified mental patient—refusal to plead insanity—sentence*

R. *v*. HOLLINGSWORTH [15] (Court of Criminal Appeal: Lord Goddard C.J., Ormerod and Donovan JJ.: July 9, 1956).

H. pleaded guilty at the County of London Sessions to threatening to murder and demanding money with menaces and was sentenced to five years' and three years' imprisonment, the sentences to run concurrently. H. was 41 years of age and previously of good character. Since 1952, he had spent a considerable time in a mental hospital, at first voluntarily and, later, as a certified patient. He had absconded from the hospital when he committed the present offences. H. committed the offence of threatening to murder by writing a letter containing abuse and a threat to kill to the doctor under whose care he had been, complaining of his treatment. The offence of demanding money with menaces took place when H. entered a Post Office and, putting his hand in his pocket as if there was a gun there, said to the counter-clerk: "I want the money out of the till." H. appealed to the Court of Criminal Appeal against his sentence.

*Held*, dismissing the appeal, that as H. refused to enter a plea of insanity, the only course was to send him to prison for a considerable period. If, during the period of imprisonment, the prison authorities and the medical authorities came to the conclusion that he should again be certified as insane, then that could be done. [H. P.]

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[15] For the appellant: *R. D. L. Du Cann* (instructed by the Registrar, Court of Criminal Appeal). The Crown was not represented.

COMMENTARY. In criminal law a fine line has to be drawn between the right to freedom of the individual and the right to protection of the public. This case raises the same point as *R.* v. *Barnett* [1956] Crim.L.R. 560, namely, what is to be done when there is evidence pointing to the insanity of the defendant, but he refuses to plead insane? How is the protection of other people to be ensured? The imposition of life imprisonment, which gives the Home Secretary discretion as to when he will release a prisoner, suggested as a solution in our commentary to *R.* v. *Barnett,* is a course which could not be followed in the present case since the maximum sentences for sending a letter threatening to kill and for demanding money with menaces are ten years' and five years' imprisonment respectively (Offences against the Person Act, 1861, s. 16; Larceny Act, 1916, s. 30).

A certified patient who escapes from the place where he is lawfully detained under the Lunacy Acts, 1890–1930, may be retaken at any time within fourteen days after his escape without a further reception order (Lunacy Act, 1890, s. 85). After that time, however, fresh proceedings under the Lunacy Acts must be taken before he can again be detained as a certified patient: see *Harnett* v. *Bond* [1925] A.C. 669 at 678.

It is for the jury to decide whether a letter amounts to a threat to kill: *R.* v. *Tyler* (1835) 1 Mood. 428.

See Archbold, 33rd ed., 698, 1316.

**Sentence**—*Corrective training—sentence of imprisonment while defendant undergoing corrective training*

R. *v.* NOLAN [16] (Court of Criminal Appeal: Streatfeild, Ormerod and Pearce JJ.: June 18, 1956).

N. pleaded guilty at quarter sessions to two offences of larceny in a dwelling-house and two offences of housebreaking and larceny. He had been sentenced in June, 1953, to three years' corrective training for sacrilege and larceny and was released on licence in June, 1955. Subsequently a recall notice was issued recalling him to corrective training, and it was while he was on licence but under notice of recall that the present offences were committed. The chairman of quarter sessions sentenced N. to five years' imprisonment, expressed to be consecutive to the remainder of the sentence of corrective training, *i.e.*, not to commence until December 8, 1955, when the sentence of corrective training expired. N. appealed to the Court of Criminal Appeal against his sentence:—

*Held*, that the appeal was before the court for the question of the propriety of a sentence of imprisonment being made consecutive to a period of corrective training to be considered. In *R.* v. *Heritage* (1951) 35 Cr.App.R. 45, this court laid down that a sentence of corrective training and a sentence of imprisonment ought not to be running at the same time. In *R.* v. *Talbot* (1953) 37 Cr.App.R. 23, this court, on quite different facts, laid down that a sentence of imprisonment starting on the conclusion of a sentence of corrective training ought not to be passed, and they substituted for such a sentence a sentence of imprisonment to run concurrently with the sentence of corrective training; rather curiously, the very thing which in *Heritage's* case they said ought not to be done. In the case of *R.* v. *Wilsher* (1953) 37 Cr.App.R. 110, the position was made clear, and the court held that where a prisoner committed an offence when on licence from a sentence of corrective training, a sentence of imprisonment should be passed for the offence, unless the Prison Commissioners have reported to the court that in their opinion a further period of corrective training might be beneficial in which case the court might exercise its discretion. If, as in the present case, the Prison Commissioners reported that a further period of corrective training would serve no useful purpose, then the way was perfectly clear to impose an immediate sentence of imprisonment. As regards the length of sentence, this court was unable to take the view that five years was excessive. Accordingly, the appeal would be dismissed, save that the sentence would be varied so that it ran concurrently with, and not consecutive to the period of corrective training.

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[16] For the appellant: *Jean Southworth* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *F. E. Gibbens* (instructed by Penny & Thorne, Berkhamsted).

*Per* Streatfeild J. One of the obvious difficulties in the way of passing a sentence of imprisonment to commence at the end of a period of corrective training is that the Prison Commissioners have power to release the prisoner on licence, so that there might be a period during which the prisoner was at large although waiting to serve a sentence of imprisonment. [H. P.]

COMMENTARY. As Cassels J. said in *R.* v. *Heritage* sentences of imprisonment and corrective training are "almost contradictory in terms," the conditions under which they are served being so very different. This is the root of the difficulty in cases such as the present, because where a person on licence or under notice of recall to prison is sentenced to a term of imprisonment for a further offence, the previous sentence by virtue of which he is on licence or under notice of recall does not cease to have effect; it does if he is sentenced to corrective training (see section 26 (6) of the Prison Act, 1952). In *R.* v. *Talbot* the Court of Criminal Appeal got round the difficulty by providing that the sentences of imprisonment should be concurrent with the sentence of corrective training and that the whole sentence should be served as one of corrective training. The present case, following *R.* v. *Wilsher*, makes it clear that where a person commits an offence while on licence a court has no alternative but to sentence him to imprisonment if the Prison Commissioners report that they do not recommend a further period of corrective training. If the Prison Commissioners report otherwise it seems that if possible the court should impose a further period of corrective training: see the remarks of Lord Goddard C.J. in *R.* v. *Talbot* (1953) 37 Cr.App.R. at p. 26.

**Witness**—*Previous inconsistent statement.* See R. *v.* ALLPRESS, p. 622, above.

# *Acts and Orders*

## Agriculture

AGRICULTURE (SAFETY, HEALTH AND WELFARE PROVISIONS) ACT, 1956 (4 & 5 Eliz. 2, c. 49): operative July 5, 1956. Regulations may be made for securing the safety and health of workers employed in agriculture, and a person contravening any provision of such regulations will be guilty of an offence (s. 1). A young person, *i.e.*, a person who is over compulsory school age for the purposes of the Education Act, 1944, but has not attained the age of eighteen, may not be employed as a worker in agriculture to lift, carry or move a load so heavy as to be likely to cause him injury, and regulations may be made prescribing the maximum weights which may be lifted, carried or moved by other workers. If these provisions are contravened the employer is guilty of an offence (s. 2). A sanitary authority and the Minister of Agriculture, Fisheries and Food (in Scotland, the Secretary of State) may serve notices requiring the provision of suitable and sufficient sanitary conveniences and washing facilities respectively. Subject to a right of appeal against the notice to a court of summary jurisdiction and then to quarter sessions, failure to comply with any such notice is an offence (s. 3). Regulations may require the provision of sanitary conveniences by agricultural contractors (s. 4). Where it appears to a sanitary authority that a sanitary convenience is not being properly maintained it may serve a notice requiring steps to be taken to secure its proper maintenance. Failure to comply with the notice is an offence, but it is open to the defendant to question the reasonableness of its requirements (s. 5). First aid boxes or cupboards containing prescribed articles must be provided, and regulations may be made requiring containers of first aid requisites to be provided in certain places (s. 6).

Regulations may be made prohibiting children who have not reached the age (at present thirteen) at which their employment ceases to be prohibited under the Children and Young Persons Act, 1933, s. 18 (1) (*a*), from riding on or driving prescribed vehicles or machines while they are being used in the course of agricultural operations or are going to or from the site of such operations, or from riding on agricultural implements of prescribed classes while the implements are being towed or propelled, whether by vehicles, machines or animals. A person permitting a child to contravene such regulations will be guilty of an offence (s. 7).

Regulations may require the notification of, and keeping of records as to, accidents and diseases. In prosecutions for contraventions of such regulations it will be a defence for the person charged to prove that he was not aware that the accident had occurred or that the disease had been contracted (s. 8).

Provision is made for the attendance of an inspector or some other person on behalf of the Minister of Agriculture, Fisheries and Food (in Scotland the Secretary of State) to attend the inquest on the body of a person whose death may have been caused by an accident occurring in the course of agricultural operations (s. 9).

Inspectors may be appointed for the purposes of the Act, and regulations made under it. They may enter at all reasonable hours any land which is being used for agriculture or which they have reasonable cause to believe is so used, but admission may not be demanded to a dwelling-house unless twenty-four hours' notice of the intended entry has been given to the occupier. If so required an inspector must produce some duly authenticated document showing his appointment. Inspectors are given certain powers to require the production of documents and to demand information. Any person who fails to comply with an inspector's requirement, or who in purported compliance with it makes a statement which he knows to be false in a material particular or recklessly makes a statement which is false in a material particular, or who prevents or attempts to prevent any other person from appearing before or answering an inspector, or who obstructs an inspector in the exercise or performance of his powers or duties, commits an offence (s. 10). Persons duly authorised in writing by a sanitary authority are given powers of entry similar to those of inspectors (s. 11).

A person who wilfully makes a false entry in a register, record, or return or other document kept or furnished in pursuance of regulations under the Act, or who wilfully makes use of such a false entry, is guilty of an offence (s. 12). A worker who wilfully interferes with or misuses any equipment, appliance, facilities or other thing provided in pursuance of the Act or regulations made under it also commits an offence (s. 13).

### *Penalties*

The penalty for offences is, on summary conviction, a maximum fine of £50. Where regulations so provide a failure to do anything at or within a specified time is deemed a contravention of the regulations continuing until that thing is done. Where an offence which has been committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer or a person purporting to act in any such capacity, he is also deemed guilty of the offence (s. 14). Where a contravention of the Act or regulations made under it for which a person is liable to a penalty was due to the act or default of another person, then whether or not proceedings are taken against the first person, that other person may be charged with and convicted of the contravention (s. 15). It is a defence for a person charged with a contravention of the Act or regulations to prove that he used all due diligence to secure compliance with the relevant provision (s. 16).

The Act may be extended to persons employed otherwise than in agriculture (s. 18). Premises occupied for agricultural purposes and those where work is carried on in which are employed persons to whom this Act has been extended may be excluded from the operation of the Factories Acts, 1937 and 1948 (s. 19). A notice under the Act must be in writing and may be served on the person to whom it is to be given either by delivering it to him or by sending it by post addressed to him at his usual or last known place of abode (s. 20).

As to the application of the Act to Scotland, see section 25.

## Animals

CALVES (FEEDING IN TRANSIT) ORDER, 1956 (S.I. No. 1127): operative August 13, 1956. Where calves are being carried by rail or by road the only milk with which they may be fed is milk which has been reconstituted from dried milk.

For penalties for contravention, see section 79 of the Dieases of Animals Act, 1950.

## Armed Forces

See CONVEYANCE OF EXPLOSIVES REGULATIONS, p. 642, below.

## Betting

SMALL LOTTERIES AND GAMING ACT, 1956 (4 & 5 Eliz. 2, c. 45): operative August 5, 1956. Subject to prescribed conditions the Act authorises the conduct of small lotteries promoted for raising money on behalf of a society registered by the local authority, established wholly or mainly for charitable purposes, participation in or support of athletic sports or games or cultural activities, or other purposes, not being purposes of private gain or of any commercial undertaking (s. 1 (1)). The conditions of the conduct of such lotteries, which are set out in detail, concern the appointment of the promoter, his remuneration and that of persons employed by him, the application of the proceeds, the sale of tickets and chances and advertisements and notices. No prize may exceed £100 in amount or value, and no ticket or chance may be sold at a price exceeding one shilling. The total value of tickets and chances sold may not exceed £750, and if two lotteries are promoted on the same day on behalf of the same society, the total value of the tickets and chances sold in these lotteries taken together may not exceed that sum (s. 1 (2)). Tickets and chances are deemed to be on sale on each day between the dates on which they are first and last sold (s. 1 (5)). If any condition required to be observed in respect of a lottery is contravened, the promoter and any other person who is a party to the contravention is guilty of an offence. It is a defence for the promoter to prove that the contravention took place without his knowledge. If a person is charged with an offence concerning an appropriation from the proceeds for expenses or prizes or payment out of other moneys of the society for expenses and prizes then he may prove that the proceeds of the lottery fell short of the sum reasonably estimated, that the appropriation or payment was made in respect of expenses actually incurred or in order to fulfil an unconditional undertaking as to prizes, and that the total amounts appropriated or paid did not exceed the amounts which could lawfully have been appropriated out of the proceeds of the lottery if they had amounted to the sums reasonably estimated (s. 1 (3)).

### *Registration*

An application for the registration of a society should be made to the council of the county borough or county district in whose area the office or head office of the society is situated. In London it should be made to the Common Council of the City of London or the council of a metropolitan borough and in Scotland to the county council or town council. The application should specify the purposes for which the society is established and conducted.

The fee for registration is £1 (s. 2 (1), (6) ). A further fee of £1 is payable on January 1 each year (s. 2 (5) ). The local authority may after giving the society concerned an opportunity of being heard, refuse to register a society, or revoke a registration if it appears that any person has been convicted of an offence under this Act or under section 22 of the Betting and Lotteries Act, 1934, committed in connection with a lottery on behalf of the society, or that the society is not or has ceased to be one to which the Act applies (s. 2 (2) ).

The Pool Betting Act, 1954 ([1954] Crim.L.R. 637), s. 1 (5), (6), which provide a right of appeal to quarter sessions, or in Scotland to the sheriff, from the refusal or revocation of a registration, apply to registrations under this Act (s. 2 (3) ). The promoter of a lottery must send a certified return to the local authority not later than at the end of the third month after that in which the winners of prizes are ascertained, showing the whole proceeds of the lottery, the sums appropriated for expenses and prizes, the purposes to which the proceeds were applied and the dates between which tickets or chances were sold. Such a return is to be kept for at least a year and during that time may be inspected by any member of the public. A person who fails to send a return or knowingly gives any information which is false or misleading or certifies a return knowing it to contain such information is liable on summary conviction to a maximum fine of £20 (s. 3).

Entertainments at which games of chance or of chance and skill combined are played in accordance with prescribed conditions are exempted from prohibitions against gaming and lotteries. Not more than one payment not exceeding five shillings may be made by each player in respect of all games played at the entertainment and not more than one distribution of prizes or awards of a total value not exceeding £20 may be made in respect of all the games. The proceeds must be applied for purposes other than those of private gain (s. 4 (1)–(3) ). Gaming is still prohibited on licensed premises (s. 4 (6) ).

In proceedings for an offence under section 22 of the Betting and Lotteries Act, 1934, which concerns the printing and distribution of tickets and the use of premises for lotteries, it is a defence to prove that the lottery concerned is lawful under section 1 or section 4 of this Act (s. 5 (1) ).

### Children and Young Persons

Family Allowances and National Insurance Act, 1956 (4 & 5 Eliz. 2, c. 50): operative on days to be appointed. Where any child or young person under the age of eighteen has by order of any court under the Children and Young Persons Act, 1933, or the Children and Young Persons (Scotland) Act, 1937, been committed to the care of a local authority as a fit person, then, if it appears to the authority that it will or may be for the benefit of the child or young person, they may allow him to be under the charge or control of a parent, guardian, relative or friend, until the authority determines otherwise (s. 5 (1) ). If while the child or young person is so in the charge of a parent or other authorised person it appears to the local authority that the order of the court is no longer necessary the authority may apply to the court for it to be revoked (s. 5 (2) ). If the local authority determines that the child should be returned to their care then if their decision is not complied with, the child or young person will be deemed to have run away from the authority for the purposes of section 85 of the Act of 1933 and section 89 of the Act of 1937, which relate to escapes from the care of fit persons (s. 5 (5) ).

See AGRICULTURE (SAFETY, HEALTH AND WELFARE PROVISIONS) ACT, 1956, ss. 2, 7, pp. 636, 637, above.

### County Court

ADMINISTRATION OF JUSTICE ACT, 1956 (4 & 5 ELIZ. 2, C. 46): operative on days to be appointed. A county court judge may in certain circumstances commit a debtor to prison for not more than fourteen days where the debtor having been ordered to attend an adjourned hearing of a judgment summons fails to do so, or attends the hearing but refuses to be sworn or to give evidence (s. 27).

The maximum fines which may be imposed under section 31 of the County Courts Act, 1934 (assaults on officers of a county court), section 124 (rescuing goods seized in execution under process of a county court), and section 139 (insulting behaviour in a county court and similar contempts), are increased from £5 to £20. Instead of imposing a fine under any of these sections, a county court judge may commit the offender to prison for not more than one month. On summary conviction of an offence under sections 31 or 124 a person is liable to a maximum fine of £20 or to imprisonment for not more than one month (s. 29).

### Defence Regulations

DEFENCE REGULATIONS (NO. 2) ORDER, 1956 (S.I. No. 1005): operative July 8, 1956. Regulation 58A of the Defence (General) Regulations, 1939, which empowers the Minister of Labour and

National Service by order to make provision for regulating the engagement of workers by employers, is revoked.

## Explosives

CONVEYANCE OF GOVERNMENT EXPLOSIVES AND EXPLOSIVES OF VISITING FORCES REGULATIONS, 1956, IN HARBOURS (S.I. No. 1048); BY RAIL (S.I. No. 1049); BY ROAD (S.I. 1050): all operative September 1, 1956. Previous Regulations concerning the conveyance of Government explosives (including S.I. 1953, No. 1703, and other regulations not published as statutory instruments) are revoked and replaced with certain amendments, the new Regulations applying to the explosives of visiting forces as well. The principal change in relation to explosives in harbours is that certain additional explosives are required to be taken into account in calculating the quantities of various categories of explosives which may be in a vessel in a harbour area and in determining the distances which are to be maintained in such an area between a vessel containing explosives belonging to shipping category C and any other vessel or vehicle containing explosives. There are certain alterations in the classification of Government explosives.

The Regulations concerning conveyance by rail and by road classify explosives into groups. Notice must be given to the railway authority, or, in the case of conveyance by road, to the consignee before any conveyance takes place. The explosive must be identified by specified markings and must be segregated from other substances. Certain safety precautions are to be observed during loading, unloading and conveyance, special precautions being prescribed for certain types of explosive.

With regard to conveyance by rail, explosives must be conveyed by merchandise trains, except under specified conditions. The types of rail vehicle in which explosives may be carried, the quantity which may be in such a vehicle and the composition of trains carrying explosives are prescribed.

Where explosive is conveyed by road the amount which may be carried is limited. Constructional and safety requirements are prescribed for the various types of vehicle employed. The use of passenger vehicles is restricted.

The Explosive Substances Act, 1875, does not apply to explosives conveyed in accordance with these Regulations (see s. 97 (5)).

## Food and Drugs

FOOD STANDARDS (CURRY POWDER) (AMENDMENT) REGULATIONS, 1956 (S.I. No. 1166): operative August 2, 1956. The limit of lead which may be present in curry powder is raised from 10 parts per million to 20 parts per million.

FOOD STANDARDS (TOMATO KETCHUP) (AMENDMENT) REGULATIONS, 1956 (S.I. No. 1167): operative August 2, 1956. A limit of 20 parts of copper per million parts of tomato ketchup, catsup, sauce or relish is substituted for the previous limit.

As to Scotland, see p. 649, below.

### Gaming

See SMALL LOTTERIES AND GAMING ACT, p. 639, above.

### Intoxicating Liquors

OCCASIONAL LICENCES AND YOUNG PERSONS ACT, 1956 (4 & 5 ELIZ. 2, c. 42): operative September 5, 1956. Sections 127 and 129 of the Licensing Act, 1953, which prohibit the employment in bars of persons under eighteen and restrict the supply of intoxicating liquor for consumption on the premises to such persons, are extended and apply to the holder of an occasional licence granted under section 151 of the Customs and Excise Act, 1952, and to the place where intoxicating liquor is sold under such an occasional licence.

Section 30 of the Licensing Act, 1949, and the Intoxicating Liquor (Sale to Persons under Eighteen) Act, 1923, which make corresponding provision for Scotland, are similarly extended.

For penalties for offences, see the provisions cited.

### Juvenile Courts

JUVENILE COURTS (LONDON) ORDER, 1956 (S.I. No. 1001): operative July 2, 1956. The South-East London Juvenile Court now sits at Church Hall, Ashburnham Place, Greenwich, S.E.10, instead of at the Tower Bridge Police Court, Tooley Street, S.E.1.

### London

The following Orders have been made detailing prescribed routes: S.I. 1956, Nos. 1100 (St. Marylebone); 1176 (Croydon).

The following Orders have been made prohibiting waiting: S.I. 1956, Nos. 1120 (Seal); 1177 (Egham, Surrey).

The following Order has been made amending Regulations imposing restrictions on the sale of goods from vehicles and on vehicles with regard to waiting, loading and unloading: S.I. 1956, No. 1063 (Edmonton, Camberwell, Esher, Heston and Isleworth and Wandsworth).

See JUVENILE COURTS (LONDON) ORDER, p. 643, above.

### Magistrates' Courts

MAGISTRATES' COURTS (APPEALS FROM BINDING OVER ORDERS) ACT, 1956 (4 & 5 ELIZ. 2, c. 44): operative July 5, 1955. Where under the Justices of the Peace Act, 1361, or otherwise a person is ordered by a magistrates' court to enter into a recognisance with or without sureties to keep the peace or to be of good behaviour, he may appeal to a court of quarter sessions. The other party to the proceedings which were the occasion of the making of the order should be cited as the respondent to the appeal. Section 2 of the Summary Jurisdiction (Appeals) Act, 1933, which relates to legal aid, and, in relation to an appellant in custody for failure to comply with the order, so much of section 37 of the Criminal Justice Act, 1948, as relates to the release of convicted persons from custody pending an appeal to quarter sessions, apply as if the appeal were an appeal against a conviction.

The Act does not apply to any order made before August 5 nor in relation to any order an appeal from which lies to quarter sessions apart from the provisions above. The Act does not extend to Scotland or Northern Ireland.

### Medicine

THERAPEUTIC SUBSTANCES AMENDMENT REGULATIONS, 1956 (S.I. No. 1131): operative August 1, 1956. The method of manufacture of inactivated poliomyelitis vaccine and the tests for safety and efficacy to be applied to it are prescribed.

For penalties for offences, see section 6 of the Therapeutic Substances Act, 1956.

### Merchant Shipping

MERCHANT SHIPPING (COLONIES, ETC.) TONNAGE MEASUREMENT ORDER, 1956 (S.I. No. 1002): operative July 13, 1956. With some modification the Merchant Shipping Act, 1954, which relates to the deductions to be made for the space occupied by the propelling power in measuring the tonnage of merchant ships, is extended to a number of colonies and other territories listed in the Second Schedule to the Order.

### National Insurance

WORKMEN'S COMPENSATION AND BENEFIT (SUPPLEMENTATION) ACT, 1956 (4 & 5 ELIZ. 2, c. 51): operative July 5, 1956. The Act provides for the payment of allowances out of the Industrial Injuries Fund to certain persons entitled to allowances under the Workmen's Compensation Acts. If any person for the purpose of obtaining an allowance or payment under the Act whether for himself or for some other person knowingly makes a false statement or a false representation or produces or furnishes, or causes or knowingly allows to be produced or furnished, any document or information which he knows to be false in a material particular he is liable, on summary conviction, to a maximum fine of £100 or not more than three months' imprisonment, or both (s. 4 (1)). The Minister of Pensions and National Insurance has power to make regulations under the Act which may provide for the recovery on summary conviction of monetary penalties not exceeding £10, or in the case of continuing offences, £10 for each day on which they are so continued (s. 5 (2)). Proceedings for an offence under the Act may be commenced at any time within twelve months after the commission of the offence (s. 5 (4)).

### Open Spaces

VICTORIA TOWER GARDENS REGULATIONS, 1956 (S.I. No. 1038): operative July 17, 1956. Previous Regulations of 1932 (S.R. & O. No. 866) and 1934 (S.R. & O. No. 533) are revoked and replaced. A number of acts are prohibited and for others written permission is required. Any person who contravenes the Regulations must on demand by a park keeper or police constable give his name and address.

For penalties for contraventions see section 2 of the Parks Regulation (Amendment) Act, 1926.

### Public Health

CLEAN AIR ACT, 1956 (4 & 5 ELIZ. 2, c. 52): operative on a day to be appointed. The Act is intended to give effect to recommendations made in the Report of the Committee on Air Pollution (Cmd. 9322), and to abate pollution of the air.

The emission of dark smoke from a chimney of any building is prohibited, save as permitted by regulations made by the Minister of Housing and Local Government (in Scotland, the Secretary of State). It is a defence in proceedings for contravention of this provision to prove that it was solely due to the lighting up of a furnace which was cold and that all practicable steps had been taken to prevent or minimise the emission of dark smoke, or subject to certain conditions was solely due to some failure of a furnace or apparatus used or the use of unsuitable fuel (s. 1). In proceedings for a contravention occurring not more than seven years after July 5, 1956, it is a defence to prove that it was due to the nature of the building or its equipment and it had not been practicable to alter or equip the building so that it would be used for the purpose for which it was intended without the likelihood of a contravention (s. 2). The penalties for offences are, on summary conviction, in the case of smoke from the chimney of a private dwelling a maximum fine of £10, and in the case of smoke from any other chimney a maximum fine of £100 (s. 27 (1)).

No furnace, other than one designed solely or mainly for use for domestic purposes may be installed in a building or in any boiler or industrial plant attached to a building or for the time being fixed to or installed on any land unless it is so far as practicable capable of being operated continuously without emitting smoke when burning fuel of a type for which the furnace was designed. Notice must be given to the local authority of the proposal to instal the furnace and a person failing to give such notice is liable on summary conviction to a fine of £10 (ss. 3, 27 (2)). Regulations may require the installation of apparatus to indicate and record the density or darkness of smoke (s. 4).

### *Grit and dust*

Save with regard to furnaces designed solely or mainly for domestic purposes, the occupier of any building in which a furnace is used to burn solid fuel or solid waste, or of any building or land in or on which an oven is used to subject solid fuel to any process involving the application of heat must use any practicable means there may be to minimise the emission of grit and dust from any chimney (s. 5). Subject to certain provisions no furnace in any building may be used to burn pulverised fuel or to burn at a rate of one ton an hour or more solid fuel in any other form or solid waste, and no oven in any building or on any land may be used to subject solid fuel to any process involving the application of heat, unless the furnace or oven is provided with plant for arresting grit or dust which has been approved by the local authority or which has been installed in accordance with plans and specifications submitted to and approved by the local authority, and that plant is properly maintained and used (s. 6). The local authority may require compliance with regulations made by the Minister (in Scotland the Secretary of State) as to the measurement of grit and dust emitted from furnaces and ovens (s. 7). The local authority may also require information about furnaces, ovens and fuel consumed (s. 8). These provisions as to grit and dust apply with modifications to outdoor furnaces (s. 9). The height of certain chimneys may be controlled by the local authority, an appeal from their decision lying to the Minister (in Scotland, to the Secretary of State) (s. 10).

*Smoke control areas*

A local authority may, by order confirmed by the Minister (in Scotland, the Secretary of State) declare the whole of the district of the local authority or any part of it a smoke control area. Subject to certain exemptions and limitations if on any day smoke is emitted from a chimney of any building within that area, the occupier is guilty of an offence. It is a defence to prove that the emission of smoke was not caused by the use of any fuel other than an authorised fuel (s. 11). The penalty for an offence under this section is on summary conviction a maximum fine of £10 (s. 27 (2) ). Provision is made for grants towards the cost of any necessary conversion of appliances in private dwellings, churches, chapels, etc. (ss. 12–15).

Smoke other than smoke emitted from a chimney of a private dwelling or dark smoke emitted from a chimney of a building or from a chimney serving the furnace of a boiler or industrial plant attached to a building or for the time being fixed to or installed on any land is, if it is a nuisance to the inhabitants of the neighbourhood, deemed a statutory nuisance for the purposes of Part III of the Public Health Act, 1936 and the Public Health (Scotland) Act, 1897. The maximum fines which may be imposed are in the case of a conviction for a failure to comply with, or for a contravention of, a nuisance order, £10 and a further £5 for each day on which the offence continues after conviction. In the case of smoke emitted from a chimney it is a defence for the defendant to prove that the best practicable means have been employed to prevent the nuisance (s. 16).

Subject to certain provisions the Act does not apply to premises controlled under the Alkali, etc., Works Regulation Act, 1906, but that Act has effect in relation to smoke, grit and dust from such premises as it has effect in relation to noxious or offensive gases (s. 17). There are special provisions as to colliery spoilbanks, railway engines, vessels, investigations and research and Crown premises (ss. 18–22). Clean Air Councils for England and Wales and for Scotland are to be appointed (s. 23). Building by-laws may require the provision in new buildings of such arrangements for heating or cooking as are calculated to prevent so far as practicable the emission of smoke (s. 24). Local authorities are given certain powers with regard to research and publicity (s. 25). It is an offence for any person to disclose any information relating to a manufacturing process or trade secret used in carrying on a particular undertaking which has been furnished or obtained under the Act unless the disclosure is made with the consent of the person carrying on that undertaking, or in connection with the execution of the Act or for the purposes of any legal proceedings arising out of the Act or of any report of such proceedings (s. 26). The penalties are, on summary conviction, a maximum fine of £100 or imprisonment for not more than three months or both (s. 27 (3) ).

*Penalties and enforcement*

Where no special penalty is provided a person guilty of an offence under this Act is liable on summary conviction to a maximum fine of £100. Where a person is convicted of such an offence (except for an offence under section 8) and it is shown that the offence was substantially a repetition or continuation of an earlier offence by him after he had been convicted of the earlier offence, then he is liable on summary conviction to a maximum fine of £100 or £20 for every day on which the earlier offence has been so repeated and continued within the three months next following his prior conviction, whichever is the greater (s. 27 (4) ).

In England and Wales it is the duty of the local authority to enforce the Act and they may institute proceedings for an offence under section 1 in the case of any smoke which affects any part of of their district notwithstanding that the smoke is emitted from a chimney outside that district (s. 29). Where an authorised officer of the local authority considers that an offence is being or has been committed under sections 1 or 11 of the Act or that a nuisance to which section 16 applies exists or has existed he must notify the occupier of the premises or other person concerned (s. 30).

Section 31 of the Act concerns existing enactments and section 32 concerns its application to London. A number of enactments are repealed (see s. 35, Sched. 4).

### Revenue

Exchange Control (Payments) (Egyptian Monetary Area) Order, 1956 (S.I. No. 1163); Control of Gold and Securities (Suez Canal Company) Direction, 1956 (S.I. No. 1164): both operative July 27, 1956. The restrictions of section 5 of the Exchange Control Act, 1947, which concerns payments in the United Kingdom, apply to transfers in relation to accounts of persons resident in the Egyptian monetary area. Orders of the Egyptian Government or persons resident in Egypt relating to securities or gold held in the name of or to the account of the Compagnie Universelle du Canal Maritime de Suez and requiring the person to whom the order is given to part with such securities or gold or that a change be made in the persons to whose order they are to be held may not be carried out.

For penalties for contraventions, see Schedule 5 to the Act of 1947 and regulation 92 of the Defence (General) Regulations, 1939.

## Road Traffic

ROAD TRAFFIC ACT, 1956 (4 & 5 Eliz. 2, c. 67): operative on a day to be appointed. See p. 608, above.

## Scotland

### *Food and drugs*

LABELLING OF FOOD (AMENDMENT) (SCOTLAND) REGULATIONS, 1956 (S.I. No. 1146): operative August 1, 1956. The Order of 1953 (S.I. No. 536) is amended, the principal change being the re-enactment with modifications of certain provisions concerning margarine and margarine-cheese previously contained in section 33 of the Food and Drugs Act, 1938.

PUBLIC ANALYSTS (SCOTLAND) REGULATIONS, 1956 (S.I. No. 1162): operative August 1, 1956. A person appointed a public analyst for the purposes of the Food and Drugs Act, 1956, should either hold a diploma of fellowship or associateship of the Royal Institute of Chemistry of Great Britain and Ireland and a certificate granted by that Institute after an examination conducted by them in the chemistry of food, drugs and water or have held immediately before the Act came into operation an appointment as a public analyst for the purposes of an enactment repealed by the Act. The form of the certificate given by a public analyst under section 29 of the Act is prescribed.

FOOD STANDARDS (BUTTER AND MARGARINE) (SCOTLAND) REGULATIONS, 1956 (S.I. No. 1145): operative August 1, 1956. Standards are prescribed for butter and margarine, similar to those previously contained in sections 6 (2) and 11 (1) of the Food and Drugs (Adulteration) Act, 1928.

### *Intoxicating liquors*

See OCCASIONAL LICENCES AND YOUNG PERSONS ACT, 1956, p. 643, above.

### *Probation*

PROBATION (SCOTLAND) AMENDMENT (NO. 2) RULES, 1956 (S.I. No. 1053): operative July 16. The salaries of whole-time probation officers are increased by amounts from £25 to £45. Special provision is made for women officers whose pay is gradually being made equal to that of men officers.

### Trade and Industry

SUGAR ACT, 1956 (4 & 5 Eliz. 2, c. 48): operative July 5, 1956. The Act provides for the establishment of a Sugar Board to buy Commonwealth sugar and to control sugar imports.

As from a day to be appointed a surcharge will be payable in respect of certain sugar and molasses (see ss. 7–10). Certain general provisions of the Customs and Excise Act, 1952, and other statutory provisions relating to customs or excise will, with modifications, have effect in relation to this surcharge and to surcharge repayments. The Commissioners of Customs and Excise are given power to make regulations with respect to surcharge and surcharge repayments and to apply to them existing regulations relating to sugar duty or to drawback of sugar duty. Any person contravening or failing to comply with any of these regulations is liable to a penalty of £50 and any article in respect of which an offence was committed is liable to forfeiture. In addition general provisions of the Customs and Excise Act, 1952, as to proceedings for penalties under that Act also apply (s. 11).

Distribution payments may be payable by the Sugar Board from its surplus income (see ss. 14, 15). The Minister of Agriculture, Fisheries and Food may make regulations concerning such payments. The Customs and Excise Act, 1952, s. 301 (untrue declarations and other documents), s. 302 (counterfeiting documents and other similar offences), s. 304 (fraudulent evasion of duty or import restrictions), and s. 305 (1), (3) (persons convicted of two or more offences in same proceedings and offences by bodies corporate) have effect in relation to distribution payments. A person who contravenes or fails to comply with the regulations is liable on summary conviction to a maximum fine of £50, unless a penalty is imposed by virtue of one of the above provisions of the Act of 1952 (s. 16).

The Minister may make an order concerning refined sugar manufactured in the United Kingdom governing its sale for consumption or use there. Any person who fails to purchase from the Corporation a quantity of raw sugar which he is required to purchase by virtue of such an order or who sells sugar in contravention of such an order is guilty of an offence (s. 26). The Minister may also prescribe the prices at which refined sugar may be sold (s. 27). Any person contravening such an order or who is guilty of an offence under section 26 is liable on summary conviction to a maximum fine of £100 and on conviction on indictment to a maximum fine of £2,000. Where it is proved that an offence under either section committed by a body corporate was committed with the consent or connivance of, or was attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, or any person purporting to act in any such capacity, he as well shall be deemed guilty of that offence. If he is convicted on indictment he is liable to a maximum fine of £1,000 and not £2,000 (s. 28).

The Board of Trade may by order restrict the importation of sugar into the United Kingdom. Subject to certain exceptions such an order may contain penal provisions, but offences so created may only be made punishable on summary conviction and the maximum penalties may not exceed three months' imprisonment or a fine of £100, with or without any provision as to forfeiture. If, in order to obtain a licence under such an order, a person makes a statement or provides a document or information, which to his knowledge is false in a material particular or recklessly makes a statement which is false in a material particular, he is liable on summary conviction to a maximum fine of £100, or three months' imprisonment, or both, and, on conviction on indictment, to a maximum fine of £500, or two years' imprisonment, or both. If a licence has been granted it will be void. An authorised officer may require a person to provide proof that goods are not goods imported in contravention of the order (s. 29).

## Practical Problems

*All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 3 Chancery Lane, London, W.C.2." The questions of subscribers only are answerable in the Review. All questions should be submitted in duplicate. The Publishers cannot accept any responsibility for the correctness of the replies.*

### 16. *Proof of previous conviction as rogue and vagabond*

A magistrates' court has, after conviction, remanded a "suspected person" so that the police may formally prove a previous rogue and vagabond conviction and thus enable the court to commit the prisoner to quarter sessions as an incorrigible rogue. He has been twice previously convicted as a suspected person. On the second of these occasions he was sent to sessions as an incorrigible rogue and sentenced to nine months' imprisonment. Officers who could prove the first conviction have left the force. Will the second conviction provide the magistrates' court with the evidence it requires. [S. W.]

### Answer

Yes; but what must be proved is the conviction in the magistrates' court and not the final adjudication at quarter sessions. A certified extract from the register should show quite clearly that the defendant was, before being committed for sentence on the previous occasion, convicted as a rogue and vagabond. [A. E. J.]

### 17. *Sale to youth of intoxicating liquor to be consumed by another*

A difference of opinion has arisen at the station as to the interpretation of section 129 (1) of the Licensing Act, 1953, in the following circumstances. During a routine inspection of licensed premises the licensee was seen to serve a glass of lemonade and a pint of beer to a seventeen-year old youth. The youth paid for the drinks and took them to a table at which his father was sitting. The father drank the beer, and the youth the lemonade. Some of my colleagues argue that no offence is committed by the licensee under section 129 (1), as the intoxicating liquor was not consumed by the youth, and the section is intended to prevent persons under eighteen drinking intoxicating liquor on licensed premises. [L. S.]

### Answer

Whatever the legislators intended to say, the section quoted does in fact say that the holder of a justices' on-licence shall not knowingly sell or allow any other person to sell, and a servant of the holder of such a licence shall not knowingly sell intoxicating liquor to be consumed on the premises to a person under eighteen. This is quite clear. It does not say "*by* a person under eighteen"; it says "*to* a person under eighteen." In other words, the offence is committed if (a) the intoxicating liquor is sold *to* a person under eighteen, and (b) if the intoxicating liquor is to be consumed on the premises—by *anyone,* not just the person under eighteen. There is, of course, the possible defence that the youth was the agent of his father, and that the money had been handed to the youth by his father to pass on to the licensee or his servant, such a transaction not amounting to a sale to the youth but a sale to the father, with the youth as an innocent intermediary. This, we feel, would not be a very successful defence; the whole tenor of the section seems to be directed against giving persons under eighteen *the opportunity* to drink intoxicating liquor in bars. [N. W.]

# Books and Periodicals

**Reviews:**

*A Guide to Modern Police Thinking.* A panoramic view of policing. By Raymond E. Clift. Cincinnati: The W. H. Anderson Co.; Sweet & Maxwell, Ltd. 1956. xviii and 333 and (table of criminal statutes, index and bibliography) 36 pp. (£2 15s.)

Mr. Clift, in addition to being a member of the Ohio Bar, was a policeman for twenty years, rising from patrolman to command the Cincinnati Police Training Academy. He has, therefore, been in a good position to acquire a thorough knowledge of both the practical and the theoretical sides of police work. This knowledge, together with plenty of common sense, packs the pages of this eminently sensible book. The seven sections into which the book is divided cover a wide field of police work. After a rather superficial historical survey, there is a very sound treatise on the purposes of police, and some good chapters on organisation, personnel management and training. Technical sections follow, on traffic duties, criminal investigation, general patrol work, and sociology. The next section, devoted to legal aspects, is particularly good, covering as it does the basic elements of criminal law, constitutional law, the law of arrest and search, the law of evidence and the preparation of cases for court. Finally, there is a section entitled "The Forward Look," which deals with such subjects as public relations, the influence of social change on crime, the status of the policeman in society, and his role of community leader. Many of the points made in this section will be familiar to most thoughtful police officers in this country; they are here summed up in a clear and practical way.

This book, of course, was written for American policemen. It is so well-balanced and interesting that one's first reaction is to wish someone would write a similar book for the English policeman. Until that is done, however, this will have to serve; there is much that we can profit by in it, provided we try not to laugh in the wrong places—for example, when the author tells us that a bad police witness is one who sleeps, smokes or chews tobacco in court, or who becomes too familiar or argues points of law with the judge; or when he says that one of the reasons why there is less crime in this country than in the U.S.A. is that England is so small that the criminal has hardly any place to go when he has committed a crime.

C. W.

*God Protect Me From My Friends.* By Gavin Maxwell. London: Longmans, Green & Co. 1956. xvi and 216 pp. (18s. net.)

Salvatore Giuliano was unfortunate enough to argue with a member of the Italian *carabinieri* with fatal consequences to the *carabiniere.* Thereafter he became a bandit in his home country of Sicily. He attempted to make his banditry respectable by linking it with political causes fighting for freedom from Italy and union with the U.S.A., but he failed and was treated officially as a common bandit. It was not, however, the forces of the State which eventually killed him, but his own "friends," the *mafia,* although the State tried to take the credit.

This book is well worth reading; it gives a fascinating account of the life of the peasant in this arid island and shows the local police in a less than creditable light. However, the task of policing a hostile population is one about which we now know more so that we can better understand *polizia* and *carabinieri* even if we do not like their methods.

P. A.

## Books Received:

*Gentlemen at Crime.* An autobiography. By Donald MacKenzie. London: Elek Books. 1956. 200 pp. (16s. net.)

*Reserved Judgment.* By His Honour J. Tudor Rees. London: Frederick Muller, Ltd. 1956. 254 and (index) 5 pp. (21s. net.)

*Criminals in Real Life.* By Jim Phelan. London: Burke. 1956. 166 pp. (16s. net.)

*Report of the Special Committee on the Federal Loyalty-Security Programme of the Association of the Bar of the City of New York.* New York: Dodd, Mead & Co. 1956. xxvi and 188 and (notes, appendices and index) 113 pp. ($5.00.)

*Though the Heavens Fall.* By Lord Russell of Liverpool, C.B.E., M.C. London: Cassell & Co., Ltd. 1956. 244 and (index) 5 pp. (18s. net.)

## Reader's Digest:

*Aircraft*: Jurisdiction over crimes committed aboard aircraft, a matter raised in *R.* v. *Martin* [1956] Crim.L.R. 417, is considered at 106 *Law Journal* 419.

*Evidence*: Cases as to the admissibility of evidence on charges of dangerous driving are examined at 100 *Solicitors' Journal* 500.

*Burglary*: How the charge should be framed in cases of burglary is considered in the *Police Review*, July 13, 1956, at p. 502.

*Insanity*: Should the McNaghten rules be amended? 222 *Law Times* 18.

*Prostitution*: *R.* v. *Silver* [1956] Crim.L.R. 338, in which a landlord was held not to be living on the earnings of prostitution, is criticised at 72 *Law Quarterly Review* 319.

*Magistrates' courts*: In what circumstances and to what extent can a court allow a charge to be altered?: *The Magistrate*, June, 1956, 63.

*Magistrates' courts*: A suggestion that to save time in taking depositions they should be recorded by dictaphone and read back later, if necessary after the charges have been read to the accused, is examined at 120 *Justice of the Peace* 422.

*Magistrates' courts*: Taking depositions of persons dangerously ill is the subject of an article at 120 *Justice of the Peace* 439, 453. For an article by Mr. A. E. Jones on the same subject, see [1956] Crim.L.R. 393.

*Corrective training*: After-care in corrective training is the subject of an article at 120 *Justice of the Peace* 470.

*Forensic science*: In the *Journal of Forensic Medicine*, Vol. 3, No. 2, there are articles on the study of human hairs as an aid to the investigation of crime, blood spot identification and poisoning by aspirin and paraldehyde. Hair as a means of identification is also considered in *International Criminal Police Review*, June–July, 1956, at p. 176.

THE
CRIMINAL LAW
REVIEW

*Editors*
JOHN BURKE and PETER ALLSOP, M.A.
*Barristers-at-Law*

# *Editorial*

## Footprints as evidence

At Sussex Assizes on July 30 one Malkin was found guilty of breaking into a flat and stealing articles of clothing. At the trial the prosecution submitted that the prisoner had been identified from bare footprints found in the flat. On this point Gorman J. commented: "It has become recognised that fingerprints are very strong evidence of identification, but although it may be reached in another generation, the stage has not yet been reached when scientific and biological study of footprints enables us to say: 'Yes, we are sure of it.'"

Scientifically there seems to be no reason why the principles laid down for fingerprint identification should not be applicable to foot and toe prints. As Gorman J. remarked, it is now recognised that fingerprint evidence can give a very strong clue to identification if the generally accepted sixteen points (or more) of agreement between the imprint at the scene and of the suspect are established. Even if this cannot be done, a fingerprint, even if imperfect, may often increase the possibility of tracing a criminal by searching through records. The strength of fingerprint evidence lies in the considerable accumulation of data which has been carefully filed and indexed, and no comparable records of footprints exist today. Nevertheless, if sixteen points of resemblance are established between a footprint impression at the scene of a crime and the footprint of a suspect it should provide strong evidence of identification.

## Police experiments

One of the most trying problems of the police forces is the control of road traffic, and in attempting to solve it the Durham police have made an interesting experiment. Using a television apparatus developed by Pye for industrial use, a policeman in the centre of the city watched by television the inflow of traffic along approach roads and operated the traffic lights accordingly. Previously the lights had been operated on a time basis. The camera used was no more than five inches square and on a closed circuit transmitted a sharp picture to the police control point which appeared on a screen also five inches square.[1]

At an inquest on a young man drowned in the Thames the coroner of Reading praised the work of frogmen belonging to the Berkshire Constabulary who recovered the body after all other efforts had failed. This unit of police frogmen is one of seven in this country and consists of two divers and two attendants. The divers had a week's training in a diving tank. They are " blind " once they go a foot below the surface and are guided by their attendants; when searching a wide area they swim along guide ropes let out from boats and in this way cover the search area thoroughly. They report by pulls on a rope.[2]

## Colonial judges

A matter once raised in the *Criminal Law Review* was the security of tenure of colonial judges (see [1955] Crim.L.R. 395, 586, 721). The Inns of Court Conservative and Unionist Society has recently completed a study of the appointment and tenure of office of British colonial judges and have published their findings in a short pamphlet.[3] The term " colonial judges " is used to cover only judges of the High, Supreme or Appeal Courts of all colonies, protectorates and trust territories, and it is revealed that of these all except the judges of Malta, Southern Rhodesia, the Gold Coast and the Federal judges of the Federation of Rhodesia and Nyasaland hold office " during pleasure." An attempt to accord the judges' security of tenure has been made by means of Colonial Regulations and official circulars, but the fallibility of this method is pointed out. The Society recommends that an Act be passed by the United Kingdom Parliament giving colonial judges a more effective security of tenure.

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[1] See *The Times*, August 18, 1956.

[2] See *The Times*, August 25, 1956.

[3] *British Colonial Judges.* London: Sweet & Maxwell, Ltd. 1956. 24 pp. (2s. net.)

### Traffic signs

Cannock magistrates recently had to consider whether a traffic sign was valid which differed to a slight degree from the requirements of the Traffic Signs (Size, Colour and Type) Regulations, 1950 (S.I., No. 953).[4] The defendant was charged with failing to comply with a halt sign. It was proved that the sign consisted of the usual pole inserted in the ground on to which was fixed the plate bearing the words " Halt," etc., and on top of the pole was fixed the circle enclosing the triangle. According to the Regulations the distance between the plate and the nearest point of the circle is to be six inches; on the particular sign in question it exceeded this and was about six and three-quarter inches. The magistrates held that this was such a trifling matter that the sign was not invalidated, which seems a sensible decision. But what discrepancy does invalidate a sign? Unless a firm rule is laid down, summonses over traffic signs could give magistrates' courts and the police some irritating and unnecessary trouble.

### Foreign matters

Fining on the spot has been advocated as a method of dealing with traffic offences, and in France has recently been tried in a somewhat unusual manner. Between Biarritz and St. Jean de Luz local magistrates spent a day lurking behind a hedge by the main road ready to pass immediate judgment on motorists stopped there by the police. Dispensing this very summary justice the magistrates suspended ten driving licences. Usually the complaint is at the long delay in justice; this time it was that no opportunity was given to the defendants to consult their lawyers. Such a method of dealing with traffic offenders could not be used in England under our present law.

The French Government has ordered the utmost rigour in the application of penalties for traffic offences and has strengthened police patrols. Plain clothes police patrolling the roads round Paris in cars and small lorries have been reporting by wireless on offences by drivers, so that the offenders can be stopped and fined at the next police post along the road. The drivers may, if they wish, take the case to court.

More unusual matters are reported from Turkey and Spain. In Turkey all political meetings or demonstrations are prohibited outside the electoral period. When the secretary-general of the People's Party made a tour he was closely watched by the police, who saw him meet some friends and shake hands with them. As a result the secretary-general found himself before the court. His sentence of six months' imprisonment and fine of £1,000 (Turkish) were remitted as these were first offences. In Spain two matadors were heavily fined for infringing the rules governing bull-fighting. One dispatched a bull in a prohibited manner before the correct moment for the kill; the other used an aluminium sword without a medical certificate that he suffered from some weakness of the arm caused through injury. Ordinarily a steel sword must be used.

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[4] See 20 *Journal of Criminal Law* 217.

### Sunday observance

In a letter to Mr. R. F. Crouch, Member of Parliament for North Dorset, the Home Secretary stated that there is very little prospect of early Government legislation on Sunday entertainment. The question of extending the Sunday Entertainments Act, 1932, which allows film shows and concerts on a Sunday, to other forms of entertainment has been raised a number of times in the House of Commons. In 1953 a Private Member's Bill seeking to repeal the Sunday Observance Acts was rejected by a large majority on a free vote.[5]

### Prevention of Crime

*[Certain] cinemas will not show the film "Rock Around The Clock" in south London on Sunday in view of the disturbances at other cinemas on two successive Sundays during the showing of this film. An official at one cinema said: "We have been instructed to show the film 'Gun Fury' instead . . .":* The Times, *September* 6, 1956.

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[5] See *The Manchester Guardian*, August 28, 1956.

*Subscribers and others are invited to submit for publication articles and letters on matters of interest within the scope of this Review. They should be sent to the* EDITOR, *Criminal Law Review,* 3 CHANCERY LANE, LONDON, W.C.2. *Every effort will be made to return drafts or unsuitable copy, but no guarantee can be given in this respect.*

*Books for review should be sent to the Publishers at the above address.*

# *The Davenport Case* *

By J. W. C. TURNER

(*Continued from* p. 607)

## The Facts of the Davenport Case in Relation to the Words of the Statute. The Principle in Taylor v. Plumer.

Davenport was secretary of a company and from the reports it appears to have been established that he was also servant of the company. So far as can be gathered from the reports the company's authority to meet cheques drawn on the company's bank account depended upon the signatures of two directors with the counter-signature of Davenport in addition. In accordance with this practice it appeared that some cheque forms were signed in blank by two directors and then passed into Davenport's hands, whose duty it was to complete them by filling in the names of the persons entitled to be paid by the company, and the correct amounts due to them, and to add his counter-signature in each case. Several of these cheques he dishonestly filled in with the amounts due from himself to his own creditors and the names of their respective banks as payees, and passed them to his creditors who paid them into their banks by way of settlement of D.'s debts to themselves. On these facts Davenport was in certain counts of the indictment charged and convicted of larceny of the amounts stated in the cheques, and his conviction was quashed by the Court of Criminal Appeal on the simple point that since there was no "taking and carrying away" by the prisoner of anything "capable of being stolen" as required by section 1 of the Larceny Act, 1916, there could be no larceny. With that aspect of the case we have for the moment nothing to do. There were, however, three other cheque forms signed by the two directors which Davenport proceeded to countersign and complete by filling in as payee the bank of a friend named Samuel for certain amounts of money. These he handed to Samuel who in return gave him cash and open cheques to make up their total value, which cheques Davenport in due course cashed, keeping all the money thus obtained for himself. Davenport was charged and convicted of larceny of this money as servant of the company. Before the Court of Criminal Appeal, counsel for the appellant, Davenport, is reported[1] as admitting that a verdict of guilty of embezzlement might have been possible, his submission being that the court should not substitute such a verdict as it had not been considered by the jury. Counsel for the Crown invited the court to consider that substitution, and the Court of Criminal Appeal taking the view that the evidence was such that Davenport ought to have been convicted of embezzlement and not larceny, applied the provisions of section 44 (2) of the Larceny Act, 1916, and section 5 (2) of the Criminal Appeal Act, 1907, and upheld the conviction. Lord Goddard C.J., delivering the judgment of the court, reviewed the facts of *R.* v. *Gale* (1876) 2 Q.B.D. 141, saying thereon [2] " In our opinion, that case entirely covers this case so far as the Samuel cheques are concerned." It will be observed that the judgment was unconsidered, and that the question whether Davenport really had committed embezzlement was assumed on all sides without reasons stated and without any adequate argument. Although the statutes in point beyond doubt would allow the substitution of a conviction for embezzlement where the indictment charges larceny, this is only a procedural concession and in no way relieves the prosecution from the necessity of establishing that the evidence proves that embezzlement has actually been committed. A conviction recorded even when a prisoner has pleaded guilty to a crime will be quashed if the evidence before the court shows that he was not actually guilty of that crime. (*E.g.*, *R.* v. *Jones* (1948) 33 Cr.App.R. 11, in which the accused had pleaded guilty to a count for fraudulent conversion.)

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* This article is based on a chapter in the forthcoming 11th edition of Russell on *Crime.*

[1] (1954) 38 Cr.App.R. 37 at 38, 39; [1954] Crim.L.R. 383.

On this it is submitted (a) that Davenport's case differed in material points from *R.* v. *Gale* so that Davenport's conviction cannot be justified by reliance on *R.* v. *Gale*; and (b) that the decision against Davenport on the point of embezzlement cannot be justified by any alternative argument.

As to (a) that the facts in Davenport's case were materially different from those in *R.* v. *Gale*.

(i) Davenport's dishonest actions began when he took the three cheque forms (so called cheques) in hand for his own purposes: these were not yet valid orders on the bank since Davenport's own signature was not on them. Although these forms were in Davenport's custody he did not have possession of them since he was servant of the owners (the company). He appropriated these pieces of paper *animo furandi* for himself and thus (it is submitted) committed larceny[3] of them as servant.[4] He then proceeded to commit forgery in each case by filling in unauthorised names and amounts,[5] and added his signature. The whole thus constituted a false document in each case since the completed cheque purported to be the order of the two directors of the company which it was not. As submitted above (at p. 602) it would be absurd to hold that this forging was a performance of the servant's duty to his masters.

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[2] *Ibid.* at 42–43.

(ii) Davenport's duty was to complete the cheque forms by adding the names of the real creditors of the company and the correct amount due to each, to append his own counter-signature and then to transmit the cheques to their payees. It was completely outside the scope of his duty to his masters to use *these* cheques in any other way (*e.g.*, to draw cash from the bank for office expenditure). He was not, as servant, engaged in any task of acquisition of money for his masters as was Gale, who, as we have seen, was treated by the court on the facts before them as a person who received into his possession money whether in the form of valid cheques or cash which was on its course of passing to his masters.

(iii) Davenport was in the position of a thief who, having stolen property from X, has sold it or exchanged it for other property. Gale's case is certainly no authority for the proposition that in such a situation the money or chattel which the thief so acquires is acquired on account of the victim of the theft. It is neither *transferred* to the thief by the transferor for the account of the victim, nor is it *received* by the thief for the account of the victim.[6]

(iv) Davenport passed the forged cheques to Samuel,[7] who in return gave to Davenport, for Davenport, cash and open cheques of his own.[8] Samuel paid the forged cheques into the credit of his own account with the bank inscribed by Davenport as payee. On the evidence as reported it cannot be denied that Samuel was the owner of the open cheques and cash which he handed to Davenport. There is no evidence to show whether Samuel already held the cash which he paid to Davenport, or had first to draw it out from his own bank; but this would make no difference because even in the latter event he could only obtain that cash from his bank against his own cheque, and thereby he clearly would secure from the bank a transfer of ownership of the cash to himself. There is no particle of evidence that this money was intended, either by the bank or by Samuel, to go to Davenport's masters.

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[3] *R.* v. *Perry* (1845) 1 Den. 69.

[4] The dictum of Lord Goddard C.J., " If the appellant had been charged with the fraudulent conversion of the cheques, there could have been no answer " was *obiter*, and reasons against it are suggested below.

[5] *R.* v. *Hart* (1836) 1 Mood. 486; felony, Forgery Act, 1913, s. 2 (2).

[6] This is so, no matter what civil remedy the victim may have against the thief.

[7] Thereby committing a further offence, " uttering " contrary to Forgery Act, 1913, s. 6.

[8] A further felony by Davenport, " obtaining, etc." contrary to s. 7 of the Forgery Act.

If, therefore, Davenport's conviction of embezzlement is to be justified it follows that some other basis must be found for it than *R.* v. *Gale*.

(b) Can any other basis be discovered? It has been suggested[9] that in a case of embezzlement " the duty to account for, or to pay over, the property in question must be a duty arising from the fact that the ownership in that property is in the master and that mere accountability is not enough." Some submissions in the first place arise as to this general proposition.

(i) It is not the fact that for the crime of embezzlement ownership must be in the master. The plain words of section 17 (1) (*b*) of the Larceny Act, 1916, contain no such limitation of the scope of the crime; such a limitation would indeed be mischievous. There can be situations in which property, whether chattels or money, comes into the servant's hands " for or in the name or on the account of his master " without that property being owned by the master.[10] Take a simple[11] instance of gift as an example; ownership in the thing does not pass without delivery and without the acceptance of the gift by a donee; suppose a case where there is hostility between A and B and A wishing to appease B, hands some object to B's servant with the request that the servant shall convey it to B with his compliments: if the servant honestly produces the thing to B, and B rejects it, B is not and never has been owner of it. If the servant is dishonest and retains the thing for himself telling B nothing about the matter, it could not in reason be denied that the servant would be guilty of embezzling the property, for clearly he was acting in his capacity as servant and clearly he received that property into his possession " for " his master.

(ii) That ownership need not be in the master was judicially decided in *R.* v. *Beacall* (1824) 1 C. & P. 454. The prisoner B had been found guilty on March 22 (see 1 C. & P. 310, 315) of embezzlement, but his case was reserved for the consideration of the twelve judges. Announcing the result of that consideration Park J. said:

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[9] *e.g.*, by Mr. J. C. Smith in " Embezzlement and the Disobedient Servant " 19 *Modern Law Review* 39 *et seq.*

[10] *e.g.*, *R.* v. *Foulkes* (1875) L.R. 2 C.C.R. 150.

[11] *i.e.*, not a case of declaration of trust, or statement of gift by deed.

> "On the facts of the case against you, Richard Beacall, it was objected, that the money embezzled by you . . . was money not due to your employers, and money which they could never have recovered; and that, as it was never their money, you could not be guilty of the crime of embezzlement, in converting it to your own use. I, at first, thought there was something in this objection. I was attracted by the ingenuity of it. But, on consideration, I am convinced there is nothing in it; for it is clear that you received it for, and solely on account of your employers, and by virtue of your employment, and afterwards secreted and embezzled it."[12]

(iii) It seems, however, that the article[13] now under consideration contains two further suggestions whereby to support *R.* v. *Davenport*, (a) that whenever the property is owned by the master the servant must be guilty of embezzlement if he misappropriates it, and (b) that the line of cases in which *Taylor* v. *Plumer* (1815) 3 M. & S. 562, is prominent, establish a rule under which Davenport's masters were owners of the cheques and cash which he received from Samuel.

If the second of these suggestions be not correct in relation to the facts of Davenport's case, it would not be necessary to consider the first suggestion. But it is now submitted that the first suggestion is unsound in itself as a statement of general principle; for even if the property is owned by the master it does not necessarily follow that the man is guilty of embezzlement; he can only be guilty if the other requirements of the crime are satisfied, namely, that the man was acting in the course of his duties as servant and that he had taken or received the property into his possession for, or in the name or on the account of, his master. Supposing, for example, that a ham which X had selected in the shop and bought from a tradesman were still in the delivery van of the vendor, which was standing in the public road outside X's house, and that X's gardener, setting out for home after his day's work had ended, happened to see the ham and secretly extracted it from the van and proceeded to his home with it where he and his family consumed it, this could not possibly be a crime of embezzlement. Therefore, before considering the second of the above mentioned suggestions, it is advisable to look again at the words of section 17 of the Larceny Act, 1916.

It is significant that in subsection (1) (*a*) (for larceny) the words

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[12] The judge went on to state that for another and quite different reason (not relevant to our present topic) "his Majesty has been pleased to grant his most gracious pardon to you."

[13] At 19 *Modern Law Review* 39.

" belonging to or in the possession or power of his master " occur; whereas in (b) (for embezzlement) there is no reference to the property " belonging to " the master. Apart, however, from this point the words of the statute are clear enough to show that it is both necessary and sufficient for the prosecution to establish that the property was received by the servant " for or in the name or on the account of the master." Now if the property received by the servant happened, in law, to be already owned by the master, it might be argued that the servant acting as such would, in certain situations at least, automatically receive it into his possession " for " his master. It is therefore necessary (i) to decide whether or not the property which Davenport received from Samuel was owned by Davenport's masters, the company; and even if it were owned by them, (ii) to decide whether Davenport must be held to have received it " for " or " on account of " them. If the answer to (i) be in the negative, then [14] (ii) will not arise. We must therefore deal with the question in (i).

As we have noted it has been maintained in the article [15] above mentioned that Davenport was rightly convicted for embezzlement because his masters were the owners of the property by virtue of the principles enunciated in *Taylor* v. *Plumer*.[16] In the respectful submission of the present writer this interpretation of the effect of *Taylor* v. *Plumer* is erroneous. That case was tried in the Court of King's Bench before Lord Ellenborough C.J. The purpose of the action was not to decide any question of *legal ownership* of property: the whole point in issue was whether or not the *beneficial interest* in certain property belonged to the assignees in bankruptcy of a stockbroker in priority to the claim of the principal, whose agent the stockbroker had been, and who at the moment held the property in question, which he had recovered in specie from the stockbroker after the latter's act of bankruptcy.

It appeared that Plumer, being desirous of changing some of his investments, employed one Walsh, a stockbroker, to sell certain stock owned by Plumer. This Walsh did, and paid the proceeds amounting to £21,500 into Plumer's bank. Plumer thereafter gave Walsh a draft upon his account with that bank for £22,200 with instructions that Walsh should, on December 4, 1811, lay that sum out in the purchase of Exchequer bills, which were to be delivered to Plumer or to his bank on the same day as they were purchased. Walsh on the appointed day drew out the whole sum of £22,200 from the bank, but purchased Exchequer bills to the amount of

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[14] According to Mr. Smith's view.

[15] 19 *Modern Law Review* at p. 41 *et seq.*

[16] (1815) 3 M. & S. 562.

£6,500 only, which he lodged at the bank and retained the balance of the cash; he then falsely told Plumer that he had arranged for Exchequer bills, to complete the full amount, to be delivered at a later date and had therefore left the balance of the cash due to Plumer with the bank also, to await the delivery of the said bills. In fact at that time Walsh knew well that he himself was insolvent, and he had concocted a plan under which he had contracted for the purchase by himself of American shares and stock, and bullion which he intended to pay for with his client's money and then to abscond with the same to America. This was in fact the use to which he put the balance of the money which he had falsely stated he had returned to Plumer's bank. Walsh's act of bankruptcy was committed by him on December 5. It was, however, not until December 9 that Walsh was intercepted in possession of the American shares, etc., in Falmouth, where he was awaiting the sailing of the ship in which he had taken passage to America. He then and there surrendered all the property in question to Plumer's attorney and executed a deed assigning the property to Plumer in trust to sell it and pay to himself £15,500 (the difference between the £6,500 previously paid into Plumer's bank and the original £22,200), also a bond to Plumer in the penalty of £31,000 conditioned on the payment by him of £18,500, with interest; and a warrant of attorney for confessing a judgment upon that bond.

It was in this situation that Taylor and another, who were assignees in bankruptcy of Walsh, sued Plumer in trover for the whole of the property which Walsh had surrendered to Plumer as above described. The question which arose was in effect a simple one. It was whether or not the assignee in bankruptcy could or could not be in a better position, in law and in equity, than the bankrupt himself in respect of the property in question.[17] The case was argued on both sides on the footing that a trust existed between Plumer and Walsh in respect of the cash in Walsh's hands. Counsel for the plaintiffs admitted that specific property in the hands of an agent to whom it had been entrusted would belong[18] to the principal and not to the agent's assignees in bankruptcy, and also that where the original trust property had been changed into other property the result would be the same, but only provided that the said property could be ascertained.[19] But he argued that even so on the facts of the case before the court the defendant Plumer could not rely upon that doctrine where the agent had acted for his own purposes in fraud of the trust since he might not aver to the prejudice of the other creditors, that what was done in fraud of the trust was done in execution of it. Counsel for the defendant, relying, *inter alia*, on *Scott* v. *Surman*[20] and *Whitecomb* v. *Jacob*,[1] contended that nothing vested in the assignee but what was in equity as well as in law, the property of the bankrupt; and that here, since the American shares, etc., could be ascertained as the property into which the trust money had been changed they must be treated like the money itself, and so could not vest in the assignee in bankruptcy.

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[17] Willes C.J. had stated in *Scott* v. *Surman* (*infra*) at p. 402, that in his opinion assignees in bankruptcy were "not to be considered as general assignees of all the real and personal estate of which the bankrupt was seised and possessed, as heirs and executors are . . . but that nothing vests in them even at law but such real and personal estate of the bankrupt in which he had the equitable as well as the legal interest." Lord Ellenborough's judgment in *Taylor* v. *Plumer* is seen to be in conformity with the opinion of Willes C.J. on this point.

[18] It would in this instance, of course, still be *legally owned* in the fullest sense by the principal, but for the purpose of the case in hand it would be enough, for counsel's argument, that it should be *beneficially* owned by the principal;

Lord Ellenborough in a considered judgment decided the case in favour of the defendant: but since his Lordship made it plain that he relied upon *Whitecomb* v. *Jacob* and *Scott* v. *Surman* it is necessary to set out what were the relevant points in these two cases.

*Whitecomb* v. *Jacob* was a Chancery case heard in 1709. The brief report in effect lays down two principles of equity. First, where A employed B as his factor, and entrusted B with goods for sale, for which B, having sold them, had received the money, and it is established by evidence that such money was vested in other goods and was not paid to A by B, then should B die leaving debts of higher priority than that of his debt to A, the said goods are to rank as part of the estate of A and not that of B; but secondly, if B still held the money then that money must rank as part of B's estate and must first answer the debts of a superior creditor since "that money has no ear-mark, equity cannot follow it in behalf of him that employed the factor."

*Scott and Another* v. *Surman and Another*, in 1742, was an action before the Court of Common Pleas for money had and received. The plaintiffs had consigned a quantity of tar which they had imported from Carolina to a factor R.S. in London who sold

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as would be the case, in most instances, if the agent had sold it, and without the authority of the principal to lay the money out in purchase of specified objects, nevertheless used the money in the purchase of some specific ascertained object, *i.e.*, in the second situation mentioned by counsel.

[19] In the case before the court the property was ascertained and was actually in the possession of Plumer, to whom Walsh had purported to transfer it in law; which, of course, would not be the effect of Walsh's transfer if the property had previously fallen within the rights of his creditors.

[20] (1742) Willes 400.

[1] (1709) 1 Salk. 160.

and delivered it to a firm X Y who gave the factor in part payment two promissory notes. Two days later the factor R.S. committed an act of bankruptcy and a commission was issued on the petition of one of the defendants to whom, as assignees, R.S. then delivered the two notes. The assignees confirmed the sale, settled the account [2] with the vendees of the tar, from whom they received cash payment of the notes and a balance in cash likewise. They also collected a special payment of bounty-money (approximately £300) allowed by Act of Parliament to the importers of the tar. The plaintiffs, by action for money had and received claimed (a) the amount of the money received for the notes, (b) the further balance in cash received in respect of the sale of the tar, (c) the bounty-money, all as ranking within their estate as merchants employing the factor and not as within the estate of the bankrupt factor. The judgment of the court in favour of the plaintiffs, delivered by Willes L.C.J., reveals the following points:—

(i) that on the evidence the plaintiffs would be relieved in equity if the law were against them;

(ii) that in order to prevent circuity, involving trouble and expense to suitors, a court of law should always, if possible, give a plaintiff relief at law, whenever the equity of the case is clearly with him;

(iii) that if the purchase-money of the tar had all been paid to the bankrupt *before* his bankruptcy, and had not been laid out again by him in any specific thing to distinguish it from the rest of his estate, in that case the plaintiffs could not have recovered anything in this action but would have had to prove as creditors in the factor's bankruptcy, as laid down in *Whitecomb* v. *Jacob* and in many other cases, adding "But the reason for this is so very plain that I need not cite any other [case], because money has no earmark and therefore cannot be followed";

(iv) that if the original merchandise had remained in specie unsold in the bankrupt's hands at the time of the bankruptcy the plaintiffs could have recovered them in an action of trover [3];

(v) that the thing produced ought to follow the nature of the thing out of which it is produced, if it can be distinguished;

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[2] There were other financial details involved in the case, which have no bearing on the points now under discussion and can, for greater clarity, be disregarded.

[3] *i.e.*, their action could have been based upon their right *in rem*, as owners of the goods, which, of course, do not pass into the ownership of the factor when entrusted to him. In such a situation equity would not come into the matter.

(vi) that so long as it remains a debt, it is equally distinguishable [4];

(vii) that if it can be proved that the actual money paid to the factor by the purchaser was expended in the purchase of specific goods now held by the factor, these goods are distinguishable and are held by the factor to the use of his principal, the merchant;

(viii) that in the present case the promissory notes were not money paid in discharge of the debt, but the substitution of two new debts for that debt [5];

(ix) that the bounty-money did not become due to the plaintiffs by virtue of any contract made by the factor, and when collected by the assignees was certainly received by them to the use of the plaintiffs.

Throughout this judgment then it appears that save in the case of merchandise handed to the factor by his principal and still in his hands unsold, the principal has no right *in rem* (ownership in the proper sense) and that wherever in other situations the term " belongs " or " belonging " is used it denotes no more than a right to sue by an action *in personam* for compensation, on a basis of unjust enrichment.

Turning now to *Taylor* v. *Plumer* we find exactly the same principles applied in Lord Ellenborough's judgment. The main point in issue was whether certain assets were to rank in bankruptcy as within the estate of the principal or within the estate of his bankrupt agent. The case from beginning to end went on the footing that there was a trust, and that relief would be available in equity so that the equitable rules as to the following of the trust property would apply. That very assumption negatives there being any full legal ownership in the principal since, if he were the full legal owner, equity would not need to grant relief but would leave him to pursue his adequate legal remedy, by appropriate legal procedure. But notwithstanding that point the question remains, " What if any legal remedy is there for the principal? " The answer according to the judgment in *Scott* v. *Surman* is that the law will also follow the trust property so as to enable the principal to assert his beneficial interest but only to the extent of allowing an action for money, etc., had and received, an action *in personam*. And this the law will only grant when the property into which the trust property has been converted can be distinguished and identified. So Lord Ellenborough said (1815) 3 M. & S. at 575:

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[4] *i.e.*, if the factor sells the merchandise and the purchaser has not yet paid, there is a *debt*, a chose in action, which is clearly distinguishable. The debt indeed is really due from the purchaser to the principal and not to the factor; so that should the factor become bankrupt he assigns the debts due to himself (and his other assets) to the commissioners in bankruptcy, but he does not assign the debts which are due to his principal; *Garrat* v. *Cullum* (1709) Bull N.P. 42, affirmed in K.B., *per* Parker L.C.J.

[5] If the notes had actually been negotiated by the bankrupt before the bankruptcy it must have been treated as if the money had been received, and the plaintiffs would have had to prove in the bankruptcy; but that was not the case.

> " the product of or substitute for the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such, and the right only ceases when . . . the subject is turned into money and mixed and confounded in a general mass of the same description. The difficulty which arises in such a case is a difficulty of fact and not of law. . . ."

And at 579:

> " No difficulty . . . in respect to proof, nor any peculiar rules or habits of Courts of Equity in respect to the charging of land, stand between the original proprietor and his rights in respect to the ascertained produce of his own funds upon this occasion. He has repossessed himself of that, of which, according to the principles established in the cases I have cited, he never ceased to be the lawful proprietor . . . the assignees cannot in this action recover that which . . . they could not have retained against him [the defendant] inasmuch as it was trust property of the defendant, which, as such, did not pass to them under the commission."

Certain points in this case call for further explanation.

(i) Since the American securities, etc., had been, in the first place, transferred by their owners to Walsh in the ordinary way with no knowledge of Plumer or of his relations with Walsh that transfer must surely have made Walsh the legal owner of them. It was this same property which was transferred by Walsh, after his apprehension, to Plumer in the mode most complete for the conveyance of legal ownership in that property; so that there could be no doubt but that thereafter Plumer was legal owner in the fullest sense.

At this point it is necessary to digress for a space. From the report in 4 Taunton, p. 328 *et seq.* it appears that Benjamin Walsh, Esq., M.P. had been prosecuted at the Old Bailey Sessions in February, 1812, on a charge of stealing the twenty-two Bank of England Notes of £1,000 each and one other of £200 " the property of Sir Thomas Plumer." In other counts the property alleged to be stolen was described as " a bill of Exchange for the payment of

£22,200 " and a " warrant for the payment of the like sum," in each count " the property of the said Sir T. Plumer." The jury found the prisoner guilty but the case was reserved for the consideration of the judges, before eleven of whom it was exhaustively argued in the Exchequer-chamber. The judges reserved judgment, and according to Taunton never publicly pronounced it, but the prisoner was liberated. Of this case Sir James Stephen wrote (3 H.C.L. 154) " the prisoner was released, no doubt upon the ground that the property in the specific bank notes received by Walsh never was in Sir T. Plumer but passed to Walsh subject to a contract to invest them in Exchequer Bills for his employer, which contract might or might not make him a trustee of them for Sir Thomas in such a sense that if he had suddenly died his executor would be restrained from parting with them, or that if he had retained them his creditors would not be allowed to take them otherwise than as trustees." It is submitted that Sir James Stephen's view correctly represents the real legal basis upon which *Taylor* v. *Plumer* rested. Suppose Walsh had sold and transferred the American stock to an innocent purchaser for value could it for one moment be maintained that Plumer could have recovered from that purchaser? It so happens, however, that (apparently unknown to Stephen) this case was also reported in Russell & Ryan at p. 215, and it is there stated (at p. 220) that the case was argued again on February 14, 1812, before all the judges (of whom Lord Ellenborough was one) except Lawrence and Chambre JJ.,

> " when all the judges present were of opinion that it was not a felony, and that the conviction was wrong because there was no fraud or contrivance to induce Sir Thomas Plomer " [so spelled] " to give the check . . . ; because he had never had possession of the money received at the bankers so that it could not be called his money ; and because the bankers were discharged of the money by paying it on the check, so that they were not defrauded, and it could not be said the money was stolen from them."

This decision clearly shows the limits within which Lord Ellenborough must have been speaking in *Taylor* v. *Plumer*. Throughout the case he speaks of the principal's rights depending upon the fiduciary [6] element, the " trusts," which existed in favour of Plumer.

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[6] *Crowther* v. *Elgood* (1887) 34 Ch.D. 691, where there was a debt due from an auctioneer to the representative of the vendor in respect of money paid to the auctioneer by the purchasers ; the auctioneer was held to be acting in a " fiduciary capacity " when he received the payments, and it was said by Cotton L.J. " he holds that as the money of his principal."

He completely accepted the judgment of Willes C.J. in *Scott* v. *Surman*, and as we have seen in that judgment the principal's right was said to be an action for money had and received. His reference to "lawful proprietor" must therefore be taken to mean that he had the right to claim in respect of the property what is now called a "tracing order." *Taylor* v. *Plumer* and the cases cited therein are leading cases in the doctrine of "legal tracing," the common law right to follow property. Of this Lord Haldane L.C., in *Sinclair* v. *Brougham*,[7] said "so long as the money which the principal has handed to his agent to be applied specifically, and not on a debtor and creditor account, can be traced into what has been procured with it, the principal can waive his right of action for damages for tort and affirming the proceeding of the broker, claim that his money is invested in a specific thing, which is his. . . ." In the same case Lord Parker said [8] "At law, therefore, the lender can recover the money so long as he can identify it, and even if it has been employed in purchasing property there may be cases in which, by ratifying the action of those who have so employed it, he may recover the property purchased."

(ii) In the course of argument counsel for the plaintiffs attacked the case for the defendant by asserting that it was tantamount to maintaining the untenable proposition "if A entrust his agent with money to purchase a horse, and the agent, instead of purchasing a horse, purchase a carriage, A shall have the carriage"; a doctrine which he suggested would be unreasonable and lead to great practical inconveniences. But Lord Ellenborough, slightly misquoting the statement as "If A . . . purchases a carriage with that money . . . B is entitled to the carriage" said [9] "indeed, if he be not so entitled, the case on the part of the defendant appears to be hardly sustainable in argument." This remark is capable of being misunderstood; and the following possibilities must be considered: (a) if the purchase of the carriage was within the scope of the agent's authority, then the full legal ownership would pass to B, the principal; (b) if the purchase of the carriage were not within the agent's authority, or, indeed, contrary to the known instructions of B, then B would not be legal owner; he could repudiate any liability [10] under the agent's contract with the vendor; he could refuse to take the carriage and to be burdened with the ownership of a thing he did not want just as he could if A, instead of buying a carriage, had bought a dog (for which the owner would have to take out a licence) or a wild animal such as a hyaena or a rhinoceros; (c) looking at the matter from the opposite point of view, if A, without B's knowledge, had sold the carriage for value to an innocent purchaser X and then absconded or gone bankrupt, B could not have claimed the carriage from X as property stolen from him by A; (d) but if B, learning what A has purchased, desires to have the carriage, then he can waive A's tort (*i.e.*, the conversion of B's money) and ratify A's transaction, and then call upon A to perform his contract to the same extent as if A had bought the horse. That is the meaning of Lord Ellenborough's statement "B is entitled to the carriage." See the words of Lords Haldane and Parker in *Sinclair* v. *Brougham* "affirming the proceeding of the broker" and "by ratifying the action of those who have so employed it." It is to be observed that Lord Ellenborough[11] put the successful defendant's case on the fact that he had repossessed himself of the property which was trust property; adding that if the defendant's case had rested upon his supposed adoption and ratification of the agent's conversion of his money into the American securities, it could not have been supported on that ground since his taking a security by bond and judgment to indemnify himself against loss sustained by the agent's act indicated that he disapproved and disallowed that act instead of adopting and confirming it. If it be not a question of the agent's acquiring a specific chattel, such as a carriage, but a sum of money, then the cases show that B's remedy (by "tracing") is lost unless it happens that the specific money is distinguishable by having been put in a bag, or marked, or is otherwise distinguishable.

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[7] [1914] A.C. 398 at 419.

[8] [1914] A.C. at 441.

[9] (1815) 3 M. & S. at 575.

[10] Leaving aside questions of implied warranty of authority.

Of many other cases in which the verb "belong" is used to denote not full legal ownership, but a right *in personam* to be paid by the agent a specified sum of money by which the agent has become enriched, *Morison* v. *Thompson* (1874) 9 Q.B. 480 may be cited. It was an action for money had and received by the agent T. who had without the knowledge of the principal M. taken a payment of £225 from the agent S. of the vendor of a ship which M. had instructed T. to purchase for him as cheaply as possible. There was no question of the legal ownership of the money being in M. nor any question of "tracing" property.[12] It was purely a question of the amount which M. could claim and of the action by which he could claim it. In the course of a long judgment Cockburn C.J. used the verb "belong" several times but always in the meaning of an amount of money which the principal can claim from the agent, adopting as an accurate statement (in Story on *Agency*) of the legal principle " in all cases when a person is . . . an agent for other persons, all profits and advantages made by him in the business, beyond his ordinary compensation, are to be for the benefit of his employers."

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[11] (1815) 3 M. & S. at 579.

[12] It was cash owned by S. who had passed it into the ownership of T. in whose general money it became merged. See *Lister* v. *Stubbs* (1890) 45 Ch.D. 1 at p. 10.

*Shallcross* v. *Oldham* (1862) 2 J. & H. 609, is mentioned in 19 *Modern Law Review*, at p. 50; but this was a case in Chancery seeking equitable relief by a bill praying an account of the agent's profits in dealing with a ship entrusted to him for the purpose of using it for its owner's benefit, on the principle that a trustee cannot make a profit for himself out of the trust property. The words " belong to " as used by Page Wood V.-C., of course, refer to the *equitable* interest of the *cestui que* trust; clearly the agent as trustee is the legal owner of the money which the principal can claim from him.

(*To be concluded*)

# *The Road Traffic Act, 1956—Changes in Offences*

By Harold Cassel and Michael Havers,
*Barristers-at-Law*

In this article [1] we are going to deal in detail with those parts of the Road Traffic Act, 1956, which will most affect and be of general interest to lawyers, police and magistrates; in another article we will analyse and explain the more technical innovations under the Act, such as vehicle testing, provision of parking places and meters and the alterations of the law with regard to licences.

Section 8 creates a new motoring offence, no doubt intended to replace the old and much criticised offence of motor manslaughter, the very terms of which were said to cause juries to be reluctant to convict in the face of overwhelming evidence. This new section now provides, in effect, that any person who causes death by driving recklessly or at a speed or in a dangerous manner shall be liable on conviction on indictment to imprisonment for a term not exceeding five years. This offence is not triable by quarter sessions. It will not be necessary to add a second count of dangerous driving, as juries can convict of this offence if satisfied that the driving was dangerous but not that it caused the death. Subsection (4) allows a jury to return a verdict of reckless or dangerous driving on such an indictment even though section 21 of the Road Traffic Act, 1930 (which requires notice of intended prosecution for dangerous or reckless driving to be given within fourteen days), may not have been satisfied. On the face of it this seems a reduction of the safeguards that section 21 provides to the motorist but, in fact, if somebody has met his death in a road accident very full inquiries are immediately made and usually an inquest is held so that the defendant, even if he was not charged with an offence under section 8 soon after the accident, would be unable to claim that he was prejudiced by not having received a notice of intended prosecution. It is certainly the practice of the Metropolitan Police and we believe that of many county constabularies to provide the defence in motoring cases with the names and addresses of witnesses who are not going to be called by the prosecution.

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[1] For a general review of the Act, see [1956] Crim.L.R. 608.

### *"Drunk in charge"*

Section 9 goes a long way to clear up the confusion and apparent injustice that has existed with regard to conviction and disqualification of persons technically in charge of their motor-cars whilst under the influence of drink. Before this Act the driver who habitually left his car outside his house instead of garaging it and who, in the privacy of his own home, then had too much to drink would be guilty of an offence under section 15 of the 1930 Act and could be convicted, and, unless he persuaded the court to exercise its discretion on these special reasons, he would be disqualified. The law has now been greatly improved. The relevant parts of the section read:—

"Any person who when in charge of a motor-vehicle which is on a road or other public place, but not driving the vehicle, is unfit to drive shall be liable" [to the penalties which are set out in full at the end of this article].

"Provided that a person shall be deemed for the purposes of this section not to have been in charge of a motor-vehicle if he proves—

(i) that at the material time the circumstances were such that there was no likelihood of his driving the vehicle so long as he remained unfit to drive; and

(ii) that between his becoming unfit to drive and the material time he had not driven the vehicle on a road or other public place."

Although Parliament has seen fit not to provide disqualification as a compulsory penalty at all now for "in charge" cases, by subsection (2) of section 9, for some reason which is not clear, automatic disqualification for at least twelve months follows a second or subsequent conviction for this offence. This subsection also empowers the court not to impose an order of disqualification when special reasons exist. However, since under the old Act the Divisional Court has held[2] that those very matters which now will provide a complete defence to the charge are almost the only special reasons which a court is entitled to take into consideration when deciding whether to disqualify, it is difficult to imagine what facts could amount to special reasons in a case of this sort. A previous conviction of driving whilst under the influence of drink or drugs is to be regarded as a previous conviction under this section.

### *Cyclists*

The common-sense demand that all users of the road should bear some responsibility as to how they behave on the road has been recognised by section 11, which now makes cyclists and tricyclists liable to conviction for riding under the influence of drink, dangerous, reckless and careless riding, and also provides powers to stop cyclists and tricyclists and obtain their names and addresses and in certain cases to arrest them. The logical development that notices of intended prosecution should be given is also provided for by this section. The penalties laid down indicate that Parliament feels strongly that cyclists can and must play a large part in keeping the roads safe. A table of these new penalties is set out at the end of this article.

Although the offences of driving and cycling dangerously, carelessly and so forth now are to be so similar, a previous conviction for driving thus will not count as far as penalty is concerned on one of the cycling offences and vice versa.

### *Pedestrians*

To complete the fair distribution of responsibility upon all road users pedestrians must now comply with traffic directions given by a police constable in uniform, and a pedestrian who walks across or along a carriageway against the direction of the police can be fined £10 for the first conviction and £25 thereafter. Such a person also commits an offence if he fails to give his name and address to a constable who requires it (s. 14).

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[2] See *Jowett-Shooter* v. *Franklin* [1949] 2 All E.R. 730; *Jones* v. *English* [1951] 2 All E.R. 853.

### *Dogs*

The local authority may also, in consultation with the police, designate roads upon which failure to keep a dog on a lead may result in a £5 fine. Any such designation must be confirmed by the Minister and will usually exclude sheep or cattle dogs or sporting dogs under proper control (s. 15).

### *Some minor amendments and innovations*

Among the host of minor amendments and innovations we have selected some that require some study and attention from those whose occupation takes them into the courts or requires them to enforce the new Act.

1. The power of a court to order that disqualification shall continue until the offender has passed a driving test has been extended to cover driving offences under section 15 of the 1930 Act (s. 26 (4) ).

2. Provisions have also been made as to application for removal of disqualification pending appeal, but such period of suspension tion may be made before six months if the disqualification was for less than a year or before one half of the period of disqualification if the period was less than six years, but not less than one year and in any other case three years (s. 27 (1) ).

3. Courts are now specifically empowered to suspend an order of disqualification pending appeal, but such period of suspension shall be disregarded when determining the expiration of the period of disqualification. This provision remedies the anomaly of the man who upon conviction and disqualification appeals by way of case stated to the Divisional Court and who pending appeal has his disqualification suspended. Until now it may well be that when the appeal is heard several months later, although he is unsuccessful, the actual period during which he is disqualified and, in fact, unable to drive is considerably less than the period imposed (s. 27 (2) ).

4. A great deal of learning and case law becomes redundant by reason of section 29 (2) of the new Act, which removes the compulsory disqualification upon conviction under section 35 of the 1930 Act (using an uninsured vehicle), although the other penalties remain the same; a court still has discretion to disqualify under paragraph 11 of the Fourth Schedule. As a logical result of this amendment a court no longer has power to limit a driving disqualification to the driving of a motor-vehicle of the same class or description as the vehicle in which the offence was committed (s. 29 (3) ). This provision was used almost exclusively in insurance cases to mitigate the penalty on a man who depended upon driving

for a living. Now that a court is not compelled to disqualify such a person it is unnecessary to keep a power which would be most unlikely to be used in driving cases where a man who drives his car under the influence of drink or dangerously is just as much a menace in a lorry as in a private car.

5. The Fourth Schedule to the Act sets out a list of offences in respect of which disqualification or endorsement MAY be ordered.

6. A very important amendment is included in section 26 (3) which does away with compulsory disqualification in the cases of aiding, abetting, counselling, procuring or inciting the commission of an offence carrying a penalty of compulsory disqualification.

7. The powers granted to the police of obtaining information as to the identity of the driver of a vehicle alleged to have committed an offence under the 1930 Act have been extended to cover offences under the Road Transport Lighting Acts, offences under the 1956 Act as to parking places, offences under section 10 of the London Traffic Act, 1924, and generally to offences against any other enactment relating to the use of vehicles on roads (s. 32).

8. The employee who drives his employer's van which is, in fact, uninsured is now protected by section 29. He will not be convicted if he proves that he neither knew nor had reason to believe that the vehicle was not insured and that he was driving the vehicle in the course of his employment.

9. Section 21 of the 1930 Act, which concerns notice of intended prosecution, has been extended to sections 49 and 50 of the 1930 Act, which cover failure to comply with traffic directions and signs and leaving a vehicle in a dangerous position (s. 30).

10. Restrictions have been imposed upon the use of bridlepaths and footways for motor-vehicle trials. Such trials must now be authorised by the local authority, who may impose such conditions as they think fit. A penalty of £50 may follow a summary conviction (s. 12).

11. Similarly, cycle racing on the highway must be authorised by the Minister by regulation and he may impose conditions. The police, in such cases, have the power to make all necessary traffic directions to alleviate traffic congestion and obstruction (s. 13).

## Table of Increase in Penalties for Driving Offences

| Section 1930 Act | Summary or In-dictment | Offence | Old penalty | New penalty[1] |
|---|---|---|---|---|
| 11 | S | RECKLESS OR DANGEROUS DRIVING | | |
| | | 1st conviction .. | £50 or 4 months' imprisonment. | £100 and 4 months' imprisonment. |
| | | 2nd or subsequent conviction .. | £100 and 4 months' imprisonment; compulsory disqualification, no period fixed. | £100 and 6 months' imprisonment; compulsory disqualification, not less than 9 months' (unless more than 3 years after last conviction under this section). |
| 12 | S | CARELESS DRIVING | | |
| | | 1st conviction .. | £20. | £40. |
| | | 2nd or subsequent conviction .. | £50 or 3 months' imprisonment; disqualification for 3 months. | £80 and 3 months' imprisonment; unlimited disqualification. |
| 15 | S | DRIVING UNDER INFLUENCE OF DRINK OR DRUGS | | |
| | | 1st conviction .. | £50 or 4 months' imprisonment. | £100 and 4 months' imprisonment. |
| | | 2nd or subsequent conviction .. | £100 and 4 months' imprisonment. | £100 and 6 months' imprisonment. |
| | I | Any conviction .. | Fine and 6 months' imprisonment. | Fine and 2 years' imprisonment. |

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[1] Unless stated, compulsory and discretionary disqualification remains unaltered.

## New Offences and Penalties

### *Bicycles*

The following sections of the 1930 Act have been extended to bicycles and tricycles. All these offences are only triable summarily.

| Section 1930 Act. As amended by section 11 of the 1956 Act. | Offence | Penalty |
|---|---|---|
| 11 | RECKLESS AND DANGEROUS CYCLING. | First offence: £30.<br>Second and subsequent offence: £30 or 3 months' imprisonment. |
| 12 | CARELESS CYCLING | First offence: £10.<br>Second and subsequent offence: £20. |
| 15 | CYCLING UNDER THE INFLUENCE OF DRINK OR DRUGS. | First offence: £30.<br>Second and subsequent offence: £30 or 3 months' imprisonment. |

### *Pedestrians*

| Section 1956 Act | Offence | Penalty |
|---|---|---|
| 14 (1) | FAILURE TO COMPLY WITH TRAFFIC DIRECTIONS. | First offence: £10.<br>Second or subsequent offence: £25. |
| 14 (2) | FAILURE TO PROVIDE NAME AND ADDRESS. | £5. |

# The Letter Books of the Thames Police Office

By Stanley French, M.A.

The earliest records of the courts of summary jurisdiction now known as metropolitan magistrates' courts which are still in their possession are five letter books belonging to the Thames court in Stepney. They are thick, sturdy volumes of parchment-like paper, very well bound, and contain copies, neatly written in ink which has faded to rusty brown, of letters sent between 1804 and 1842 by the magistrates or the chief clerk of the Thames Police Office at 259 Wapping New Stairs to the Secretary of State for the Home Department, to public authorities like the Board of Customs and Excise and the Board of Ordnance, to minor officials like the keepers of prisons and the master of a refuge for the destitute, and to a few private citizens. The three volumes which are devoted almost entirely to correspondence with the Secretary of State contain copies of many, but not of all, his letters to the magistrates.

Until 1839 the magistrates were not only judicial officers, they were the executive heads of the Thames Police Force, and the books contain letters about both sides of their work. As magistrates their time, like that of their present-day successors, was largely taken up with hearing charges of violence and dishonesty, whilst as chiefs of police their principal concern was the preservation of the peace and the detection of petty pilferers.

Ports have always been notorious for street fights and the slashing knife, and the Port of London is no exception. Even today Thames has many charges under the Offences against the Person Act, 1861, ss. 18 and 20, and in its early days such offences appear to have been more numerous and more serious.

The principal cause was the great frequency of disturbance in the neighbourhood of the London Docks, due to " the great number of Foreigners and Women of the worst description who are constantly in the streets, from the dreadful habit which the Foreigners have, of drawing their knives upon those who are in the least offensive to them, by which several deaths have been occasioned." One such death was the murder in Nightingale Lane.

Two watermen brothers, " being a little in liquor," were going down Nightingale Lane when they met three girls. One young roisterer took a girl playfully by the waist. She objected. The other brother tried to " pacify " her but one of her companions hit him with an umbrella. He tried to take it from her and, in doing so, pulled her into the road, whereupon she called out " Antonio," and ran into a public-house from which she returned with several foreigners, who took hold of the first waterman. There was a struggle in which he fell into the " Horse Road " with Antonio upon him. A woman cried " Spare no life," and Antonio stabbed the waterman in the back so that he died almost immediately. Antonio and two of the women were committed for trial at the Old Bailey, and the magistrates wrote to the Secretary of State suggesting that if they were convicted they should be publicly hanged near the scene of the crime as this would be a more effective warning to the foreigners of the East End than if they were hanged at Newgate.

Similar cases to that, fortunately with less grave results, have been heard at Thames quite recently, but had not inherent in them the danger that what had started as a quarrel between a few people would become something much more threatening to the public peace. In the early days of Thames it was very different; a private fight might speedily become a public riot, and the magistrates were in frequent communication with the Secretary of State about the state of order in their district. Thus, on July 6, 1810, one of them, Mr. Kinnaird, wrote to him that he had " this moment received the very unpleasant Intelligence that the London Docks are threatened with very serious and mischievous riots which are likely to take place from three causes—the first, a misunderstanding between the American and Portuguese sailors, the second, the like unpleasant circumstances prevailing among the former and the Greeks and the last (perhaps the most prominent and alarming Feature) the striking from work on the part of the Majority of Labourers in the Yard, accompanied with threats towards those who are disposed to continue orderly and peaceable." That day the arrest of four people who were brought before Kinnaird on a charge of riotous behaviour caused the crowd to disperse, but three days later there was " an appearance of tumult amongst the Portuguese sailors, but we flatter ourselves that by an interference in directing all the public houses to be closed and by other expostulations every apprehended mischief was prevented."

The strikers were still troublesome, however, and the magistrates had to deal with some far from peaceful picketing when five men were brought before them for " riotous behaviour in assaulting and throwing mud at the Labourers that were coming from work at the London Docks," and were committed to prison until the next day in default of finding sureties.

There was a good deal of industrial unrest in the Port of London in the first decades of last century, and fights between rival factions of workers were almost as common as between sailors of different nationalities. In 1832, for instance, seven coalwhippers were fined £5 each for assaulting dock labourers and lumpers. The cause of the dispute is an interesting commentary on the time. The coalwhippers, so the magistrates told the Secretary of State, were normally recruited for their job of unloading colliers by the landlords of certain public-houses who worked in connection with the collier captains and certain foremen coalwhippers (called basketmen). When a central office was opened by the dock authorities for the registration of coalwhippers the publicans objected because they would lose a lot of custom. They tried to make up for the defection of the coalwhippers by organising the ordinary labourers or lumpers for work on the colliers, which upset the coalwhippers and led to the fracas referred to in the letter.

The magistrates must have found it very difficult to prevent their duty as chiefs of police to do everything they could to preserve the peace from being very present in their minds when they had to deal with charges of breach of the peace, as appears in a letter they wrote to the Secretary of State reporting that, following an affray between Portuguese and Italian sailors in which sticks and knives were used, they had committed seven men for trial on charges of riotous behaviour but had discharged nine others because there was insufficient evidence, being " the more readily induced to this conceiving that a few only being prosecuted may answer all the salutary processes of Justice and Example."

When the magistrates were afraid that crowds might become too unruly to be controlled by their eighty or ninety constables they asked that the garrison at the Tower should be kept in readiness to help if called upon, but sometimes that garrison itself gave trouble, as in May, 1822, when a number of Guards made a violent attack on a public-house called the Black Boy in St. Catharine's Lane, in the course of which several people were injured.

The Secretary of State sometimes gave the magistrates instructions on the employment of their constables when there seemed a likelihood of grave disorders. For instance, when Sir Francis Burdett was committed to the Tower in April, 1810, by his fellow-members of the House of Commons because of his supposed breach of privilege in publishing a revised version of a speech he had made in the House calling for the release of a radical orator named Jones, Mr. Secretary Ryder directed that one of the magistrates should remain on duty all night, and that his colleagues should leave their addresses so that they could be called upon if required. They were not, because as John Harriott, the magistrate who stayed at the office, reported four days later " From the eastern side of the Tower down the River all is peaceable. Since Sir Francis Burdett has been brought to the Tower there are assembled on the Hill some crowds of Idle People but on this side without the City limits there is no appearance of disturbance."

Whilst the popular hero was in the Tower the Thames magistrates were ordered to keep on the alert and to make, at first a daily, and then a weekly report, to inquire at the public-houses for anything likely to endanger the peace, to pull down any seditious bills they found displayed, and to scrub out chalked notices ; they were to deal with the bills and notices at times when such provocative action would be least noticeable.

When Burdett was released on the rising of Parliament one Thames magistrate, Longley, went with thirty men to the Gloster Coffee House in Piccadilly and other contingents went to Marlborough Street and Hatton Gardens, whilst the cavalry were held in readiness at Worship Street and the infantry at the New Mint, Tower Hill. These precautions proved to be unnecessary, however, as Burdett, to the disappointment and annoyance of his supporters, slipped out of the Tower by the back door and departed by water, so that the crowds were deprived of the triumphal procession with which they intended to escort him to his house.

Twenty-one years later, at the time of the Reform Bill agitation, the Home Secretary again directed one of the Thames magistrates to remain at the office until he was satisfied " that all is likely to continue quiet," to report to the Home Office at 10 or 11 p.m., and to swear in " any number of respectable Householders as special constables."

Most of the letters referring to charges of theft are directed to public departments whose property had been stolen, requesting them to send a solicitor to prosecute and witnesses to identify the articles, and to consent to the cases being dealt with as misdemeanours punishable on summary conviction instead of felonies to be committed for trial. No doubt there were many others of a more serious nature about which there was no occasion to write letters.

Many of the cases mentioned have a familiar ring. The plumber in the docks who stole 35 lb. of lead, the lighterman in unlawful possession of two coils of rope belonging to His Majesty, the extra excise man who stole a sample bottle of whisky from a puncheon under his charge, the woman who stole five £5 Bank of England notes from a naval seaman just paid off from his ship, and many others whose names appear in the letters (including Thomas French, who, in May, 1812, was committed for trial at Essex Sessions for the unlawful possession of a butt or half hogshead) have had their counterparts in every succeeding generation. Even the prisoners' stories have not changed, as appears from that of Eleanor Fowley, who was arrested on the Woolwich passenger boat in November, 1812, with 45 lb. of copper nails in nine paper parcels concealed about her body, and put forward the classic defence that a man she did not know had given her the nails to take to an unspecified destination.

There is one notable difference, however. Whereas now the appearance in the dock of an employee of the Commissioners of Customs and Excise is almost unheard of, in the period covered by the letters there was nothing unusual in the conviction for theft of officers of Customs and Excise. In July, 1821, for instance, a Customs officer called John Watkinson was charged with the unlawful possession of a bottle of oil, foreign tallow candles and thirteen pieces of foreign tallow candle, which were found "concealed about him on his coming out of the London Docks," and in March, 1822, an Excise officer, Aaron Nicholson, was fined forty shillings for the unlawful possession of 1½ lb. of sugar and a bottle of Tamarinds; "the sugar was found in his hat and he was in company with an officer of the Customs who had also some sugar in his hat."

Modern police officers who are sometimes sure that the lorry driver whose vehicle was stolen whilst he was away for a few minutes, or the watchman who slept throughout a raid on a warehouse, were concerned in the crime but cannot bring it home to them, will understand the chagrin the magistrates expressed in a letter to the Secretary of State reporting that on the night of September 5, 1815, a long boat, laden with sugar, was taken from Pickle Herring (a little below London Bridge) through the Bridge to Lambeth, where it was found next morning less two hogsheads of sugar. The watchman on the boat had been asleep in another boat when it was taken. There had been several instances of goods being stolen from vessels lying about Custom House, the Tower and St. Catharine's and taken through London Bridge to Bankside where the police boats could not go except on the flood tide. The magistrates believed that the only hope of detection was that an accomplice should become a witness, "and we fear from the general conduct of the suspected persons they too well know their security if they keep their counsels." "The best chance," they said, writing then surely in their capacity as policemen and not as magistrates who must act only on the weight of the admissible evidence, "may possibly have been lost by not apprehending the watchman and subjecting him to an immediate imprisonment on what appears to us a well-grounded suspicion. We have hardly met with an instance of such Felonies unaccompanied by a neglect of the Watchman which has been frequently the result of a criminal participation."

An attractive characteristic of the work at Thames has always been that its jurisdiction extends over the seven seas. Crimes on British ships on the high seas, or in any foreign river below the bridges where the tide ebbs and flows and great ships go, which are alleged to have been committed by a British subject who is in a ship which berths on the Stepney and Poplar side of the Thames are within the jurisdiction of the Thames magistrates, so that they are occasionally called upon, as recently, to hear such charges as larceny in the Scheldt or assault in Australian waters.

The letter books refer to a number of these cases, mainly murder, from beyond the seas. In 1814, for instance, four Malay seamen were accused of piracy and murder on the East Indiaman, *Governor Raffles*, somewhere beyond the Cape of Good Hope; in 1823 a seaman was charged with the murder in India of the commander of a vessel called the *George the Fourth*, and in 1830 four convicts were alleged to have seized piratically a ship named *The Cyprus* whilst it was on a voyage from Hobart, Tasmania, to Macquarie Bay, New South Wales.

In 1836 a native of the Cape Verde Islands, Manuel Antonio de Maltos, was brought before a Thames magistrate on a charge of murdering a Belgian, Jacob Kettles, on land in the Island of Zanzibar. He was committed for trial, but the magistrate was so doubtful about his jurisdiction that he wrote to the Secretary of State to point out that the Offences against the Person Act, 1828, s. 7, under which he had acted, gave justices the power to commit for trial any British subject accused of murder on land outside Great Britain, but de Maltos was not British, although he was serving on a British ship when he went ashore and committed the alleged crime. Even if he was a British subject, the Old Bailey would have no jurisdiction to try him; only a special commission appointed under the Great Seal, as provided by section 7, would be able to do that.[1]

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[1] See now s. 9 of the Offences against the Person Act, 1861, under which such offences are triable as though committed in the place where the accused is apprehended.

Charges of high treason and of spying are not normally regarded as matters to be disposed of by magistrates, but during the Napoleonic Wars the Thames magistrates dealt with both. The alleged traitor was Charles d'Egville, alias Henry Smith. On June 8, 1814, he was taken before John Harriott, the resident magistrate, by Mr. Cole, Superintendent of Lascars of the East India Company, on a warrant said to have been issued by the Governor of Calcutta for adhering to the King's enemies in the *Ile de France*. The warrant was not produced and Harriott had no particulars at all, so he remanded d'Egville whilst he asked the Secretary of State if he knew anything about it. The Minister told him to ask the Directors of the East India Company to provide witnesses and relevant documents. The case was next referred to on July 13, 1814, when the books of the East Indiaman *Ceylon* were required to be produced in court next day. Sixteen days later the prisoner was discharged, in consequence of a note received by the magistrate from a Mr. Litchfield which appears to have satisfied him that d'Egville had enlisted on the *Ceylon* as a Frenchman. That is all that appears in the letters about this interesting case, which seems to have been dealt with in a casual way more appropriate to a highway offence than to high treason.

This is true also of the spy case, in which Guiseppe Canolle, who was said to " appear to be a native of France of superior quality," was apprehended on the evening of March 13, 1810, and charged on suspicion of his being employed by the Government of France as a spy. He was remanded whilst the magistrate again sought the instructions of the Secretary of State. The magistrate was told to proceed, and convicted Canolle of being an " alien enemy without a passport, embarked on a vessel with intent to leave the country and giving no reasonable account of his coming into England or his business here." He was sentenced to two months' imprisonment and then to be taken to Whitehall for the Secretary of State to deal with him (presumably by deportation). The master of the brig lying in the River Thames on which the alleged spy was found was fined £50 for receiving him contrary to the Aliens Act; as that master was himself a Frenchman the authorities appear, to a generation accustomed to the merciless intolerance of total war, to have treated the affair with extraordinary lightheartedness.

Other offences referred to in the letters include the possession by " a Prussian Jew of very many thousands of forged and counterfeit coin purporting to be of the current coin of his Prussian

Majesty," operating an illicit still, taking an excessive amount of gunpowder into the Pool of London, uttering forged £10 Bank of England notes, and the illicit conveyance of letters.

# A Canadian Letter

## Criminal Law Revision

An important milestone was marked in the development of the criminal law in Canada on April 1, 1955, when the newly revised Criminal Code came into force. The original Code which became law in 1892 was based upon the English Draft Code of 1879 and a consolidation of earlier Canadian legislation. Since its original enactment the Code has been subject to severe criticism, but the fundamental principle of codification has rarely been challenged. The terms of reference of the Royal Commissioners concerning the proposed revision were directed primarily to the matter of simplification and clarification. The fact that the revised Code contains some 753 sections as compared with the former 1,100 sections is a practical if not altogether wholly satisfactory standard of achievement. The original Code was not intended to be exhaustive and a prosecution for an offence at common law was still possible. Section 8 of the revised Code specifically eliminates the possibility of a conviction for a common law offence. However, certain common law offences in respect of which charges were currently laid are made statutory. For example, section 120 sets out what amounts to the new statutory offence of public mischief, and therefore the controversy raised by the apparently conflicting judgments in *Manley* [1933] 1 K.B. 529 and *Newland* [1954] Crim. L.R. 51 becomes merely academic. Common law conspiracy, indemnification of bail and compounding an indictable offence are made statutory, while champerty, maintenance and barratry were apparently considered archaic and not retained. Any defences available at common law are specifically preserved. The Minister of Justice when introducing the Bill in Parliament made it perfectly clear that the revision was not intended to alter existing principles; however, some important changes were made including the following:—

1. Provision is made for appeals in cases of contempt of court.
2. Treason is redefined to include the communication by a person to an agent of a State other than Canada of military or scientific information that he knows or ought to know

may be used by that State for a purpose prejudicial to the safety or defence of Canada

3. Section 116 makes it an offence for a witness who has given evidence in a judicial proceeding to give contradictory evidence on a material issue in subsequent judicial proceedings.
4. Section 191 defines the term criminal negligence. Subsequent sections make it an offence to cause death or bodily harm by criminal negligence, and to drive an automobile in a criminally negligent manner.
5. The offence of gross indecency is extended to include acts committed by either sex.
6. A schedule of maximum sentences for indictable offences has been adopted, namely, two years, five years, ten years, fourteen years, life imprisonment. The death penalty for rape is not continued but whipping for certain offences is retained.

Although many more interesting and controversial changes were effected it would be impracticable to attempt to list them in the limited space available.

The enactment of the Criminal Code in 1954 and its coming into force in 1955 does not mean that the work of revision is at an end. Two Royal Commissions are at the present time inquiring into the law of insanity as a defence in criminal cases and the state of the law on criminal sexual psychopaths. Both are under the Chairmanship of the Honourable J. C. McRuer, Chief Justice of the High Court of Ontario. The terms of reference of the first are:—

> "To inquire into and report upon the question whether the criminal law of Canada relating to the defence of insanity should be amended in any respect and, if so, in what manner and to what extent."

The terms of reference of the second are:—

> "To inquire into and report upon the question whether the criminal law of Canada relating to criminal sexual psychopaths should be amended in any respect and, if so, in what manner and to what extent."

The profession and public alike are anxiously awaiting the reports of the Commissions upon these two most important branches of the law.

## Some Recent Cases

*False pretences, conditional sale contract*

A recent decision of the Supreme Court of Canada in the case of *R.* v. *Hemingway* [1955] S.C.R. 712, seems to have finally settled the law in Canada with regard to the obtaining of goods by a false pretence through the medium of a conditional sale contract. Under the terms of the contract itself the accused in addition to having been given possession of the goods also obtained a further interest which is recognised by the governing provincial statute, *i.e.*, the Conditional Sales Act, R. S. B. C. 1948, c. 64. The legislature apparently intended a buyer would, from the outset, have an interest in the goods, in addition to possession; however, ownership remains in the vendor unless and until all amounts due under the contract are paid. By section 405 (1) of the Criminal Code (now s. 304) anyone is guilty of an indictable offence who "with intent to defraud, by any false pretence whether directly or through the medium of any contract obtained by such false pretence, obtains anything capable of being stolen. . . ." The Supreme Court unanimously held that the accused acquired possession of the goods plus a special property or interest therein and was, therefore, guilty of an offence under section 405. The judgment clearly indicates that some property interest must be acquired along with possession to constitute the offence of obtaining by false pretences, but that the common law refinement that the entire property interest must be obtained is not a condition of the statutory offence. The law in this regard in Canada is thereby settled and seems to run a middle course between the law in England (see *Gardiner* v. *Fudge* [1954] Crim.L.R. 210), and that of New Zealand, where under the provisions of a section similar to section 405, namely section 252 of the Crime Act, 1908, mere possession, apart from any further interest whatsoever, is apparently a sufficient "obtaining" under the section (*R.* v. *Cox* [1923] N.Z. L.R. 596; *R.* v. *Reynolds* [1935] N.Z.L.R. 944).

### *An unconscious manslaughter*

An interesting judgment was delivered recently by the Saskatchewan Court of Appeal in the case of *R.* v. *Minor* (1955) 21 C.R. (Can.) 377. The accused was charged and convicted of manslaughter through the unlawful operation of a motor-vehicle. The defence raised at trial was that the accused was at the time of the accident in an unconscious condition and did not know what he was doing. The trial judge instructed the jury that unless the condition of the accused amounted to insanity in the legal sense there was no other defence that could be entertained. The Court of Appeal ordered a new trial, stating "that when a person is unconscious from any cause and is in a condition when he cannot form an intent, in other words, when he does not know what he is doing, he has a good defence to a criminal act performed by him when in that condition."

### *Provocation*

The Supreme Court of Canada for the first time in its history reversed the judgment of a provincial Appellate Court and restored a conviction for murder in the case of *R.* v. *Tripodi* [1955] S.C.R. 438. The accused, Tripodi, who was charged with the murder of his wife, had come to Canada alone, leaving his wife and children in Italy. It was the theory of the Crown that the accused brought his wife out to Canada believing her to have been unfaithful to him, with the intention of killing her when she arrived in Canada. The defence was that the accused had forgiven her and at the time of her death, because of her statement that she had had an abortion and could have no more children, was suffering such provocation as would reduce the offence from murder to manslaughter. The majority of the Supreme Court (Kerwin C.J.C., Cartwright J., Estey J. and Abbott J., dissenting) held that there was no evidence of sudden provocation. Once the husband had become aware of his wife's infidelity, the subsequent mention to him by the wife of the same act, although it might have caused a reassertion of anger on his part, could not constitute legal provocation, in the absence of something new, for example, something in the nature of a taunt. Tripodi's sentence was subsequently commuted by the Cabinet to one of life imprisonment.

### *Accomplices and constructive murder*

Another recent judgment of the Supreme Court further clarified the law in Canada with regard to accomplices and constructive murder (*Cathro* v. *The Queen* [1956] S.C.R. 101). Two men named Cathro and Chow Bew agreed to rob Ah Wing, an elderly Chinese merchant. After they had entered the store and made their purpose known a struggle ensued and Ah Wing was subsequently found dead. The uncontradicted medical evidence given at the trial was that the storekeeper had been strangled and died of asphyxiation. The prosecution led evidence which conclusively established that Cathro and Bew had taken part in the robbery and were present in the store when Ah Wing received the injuries that subsequently resulted in his death. There was no evidence of what occurred inside the store during the robbery apart from the inferences to be drawn from the medical evidence concerning the cause of death. The two men were separately tried. Upon his trial Cathro gave evidence in his own behalf and admitted that he and Bew had entered into an agreement to rob Ah Wing. The understanding was that there was to be no violence and no weapons were carried. Under cross-examintion, however, Cathro admitted the expectation of resistance and that his understanding of the plan was that enough violence would be used to overcome this resistance. He also admitted that he had attempted to restrain Ah Wing from making any outcry but being unsuccessful had left Bew with this responsibility while he searched the store. It was apparently at this time that Ah Wing received the injuries from which he died. Cathro was found guilty of murder and the verdict was upheld by the British Columbia Court of Appeal; however, the Supreme Court of Canada in a majority judgment ordered a new trial. The members of the Supreme Court were unanimously of the opinion that there was sufficient evidence of the appellant Cathro's participation to justify the verdict had the essential matters to be determined been clearly set before the jury. From the point of view of the accused and putting the most favourable complexion possible upon the facts, the Crown attempted to establish his responsibility through sections 260 (now s. 202) and 69 (2) (now s. 21 (2)) of the Criminal Code. Under section 260 (s. 202) so far as its provisions are relevant to the facts in this case, any person in the course of committing a robbery will be guilty of murder, whether he knew or ought to have known that death was likely to ensue, if he means to inflict grievous bodily injury for the purpose of facilitating the commission of the robbery and death ensues, or if he, by any means, wilfully stops the breath of a person in order to facilitate the commission of the offence and death ensues from such stoppage. And under section 69 (2) (now s. 21 (2)) because the two men formed a common intention to rob Ah Wing, and while assisting each other in the prosecution of that robbery, Bew murdered Ah Wing, the appellant would be a party to the offence of murder if the commission thereof was, or ought to have been known by him to be, a probable consequence of the prosecution of such robbery. The accomplice will be guilty of murder then (apart of course from a finding that he aided or abetted the actual infliction of the grievous bodily harm which resulted in death) only if the commission of the murder was known or ought to have been known by him to be a probable consequence of the prosecution of the robbery. The question for the jury was put by Rand J. in the following terms: "The accused and his companion Bew undoubtedly intended force to be applied to their victim; but was there such an excess in mode or degree as converted it into an act and an offence so outrageous or so unforeseeable as to be beyond the scope of probable consequence?"

### *The Coffin case*

On February 14, 1956, one of the most highly publicised criminal cases in Canada's history was concluded when Wilbert Coffin was executed for the murder of a young American hunter by the name of Richard Lindsay. Early in June of 1953 Eugene Lindsay left his home in Hollidaysburg, Penn., to take his seventeen-year old son Richard and another young man by the name of Frederick Claar on a bear-hunting trip into the bush of the Gaspe Peninsula in the Province of Quebec. As a result of the failure of the hunting party to return home on or near the date on which they were expected, an extensive search of the bush area in which they had been hunting was commenced. The disappearance of the hunters as well as the subsequent search for them was given wide international newspaper publicity. The remains of the three hunters, almost completely devoured by bears, were found late in July of 1953. Medico-legal experts were able to establish that Richard Lindsay had been shot with a rifle. Wilbert Coffin, a prospector and guide in that part of the Gaspe and who was known to have been in the company of the Americans on at least one day early in June, was arrested and charged with the murder of Richard Lindsay. The Crown alleged that he had murdered the three hunters in order to rob them.

Coffin's trial took place in the summer of 1954 and lasted almost three weeks. The evidence was entirely circumstantial. Coffin was convicted and sentenced to be hanged. An appeal was taken to the Quebec Court of Queen's Bench (Appeal Side) (1955) 21 C.R.(Can.) 333. The appeal was dismissed by a unanimous judgment of that court. The Criminal Code of Canada provides that an appeal may be taken by an accused from the judgment affirming his conviction by a provincial Court of Appeal to the Supreme Court of Canada either if there is a dissent on a question of law in the Court of Appeal or leave is granted on a question of law by a judge of the Supreme Court of Canada. An application for leave to appeal to the Supreme Court of Canada was made in the late summer of 1955. Mr. Justice Abbott heard and dismissed the application. Counsel for Coffin took the unique step of moving before the full court by way of an appeal from the refusal of Mr. Justice Abbott to grant leave. The court held that they did not have jurisdiction to entertain such an appeal. However, two of the judges of the Supreme Court made it known that if the application had come before them in the first instance then leave would have been granted. Application was then made to the Cabinet either to exercise its right to order a new trial or to commute the death sentence to one of life imprisonment. The Cabinet then took an unprecedented step. Under the Supreme Court Act the Cabinet has the power to refer to the Supreme Court of Canada any question of law for the opinion of the court. It referred this matter to the Supreme Court of Canada [1956] S.C.R. 191, under the following terms of reference: —

> "If the application made by Wilbert Coffin for leave to appeal to the Supreme Court of Canada had been granted on any of the grounds alleged on the said application, what disposition of the appeal would now be made by the Court?"

The court held by a majority decision, Mr. Justice Locke and Mr. Justice Cartwright dissenting, that it would have dismissed the appeal. Application was again made to the Cabinet for a new trial because of the coming to light of new evidence or in the alternative for commutation of the death sentence. This application was refused. It is the feeling of the profession that as a result of the *Coffin* case amendments will probably be made to the Criminal Code to grant an appeal to the Supreme Court of Canada as of right in capital cases or to have the application for leave to appeal heard by more than one judge. The case may also affect the decision which will probably soon face the Parliament of Canada as to whether or not the death penalty should be retained.

G. ARTHUR MARTIN Q.C.,
E. PATRICK HARTT.

# Practice and Procedure

## Magistrates' Courts

*Non-appearance of gaming house frequenters after being bailed*

Section 3 of the Gaming Act, 1845, authorises the issue of warrants to enter suspected gaming houses " and to arrest, search, and bring before a justice of the peace all such persons found therein as might have been arrested therein by such justice of the peace had he been personally present; and all such persons shall be dealt with according to law, as if they had been arrested in such house, room, or place by the justice before whom they shall be so brought; . . ." The search warrant, which may be issued under section 11 of the Betting Act, 1853, to authorise similar searches and arrests in the case of suspected betting houses, " may be according to the form given in the first schedule annexed to the Gaming Act, 1845."

Warrants granted under these powers in respect of alleged gaming and betting houses are most likely to be executed at a time when there is no magistrates' court in session which has jurisdiction to deal with the persons arrested. It is customary for the police, in these circumstances, to release the defendants on their entering into a recognisance to appear at the next sitting of the court. Usually there is compliance with the terms of the recognisance, but when one of the persons arrested does not appear at the hearing it is difficult to see what further proceedings can usefully and legally be taken against him.

The power given to the police to give bail to arrested persons is contained in section 38 (1) of the Magistrates' Courts Act, 1952, which relates that power to the case of " a person's being taken into custody for an offence without a warrant." It seems very doubtful, however, whether persons arrested under a gaming or betting house warrant are taken into custody " for an offence." It is true that the operation of section 8 of the Unlawful Games Act, 1541, makes every person " using and haunting " any of these houses liable to forfeit and pay the sum of six shillings and eightpence, but no statute makes this sum recoverable before a magistrates' court. It appears that anyone who, in these times of monetary inflation, was eccentric enough to seek the enforcement of this aged provision of the law would have to take proceedings in the county court. This would be a very odd venue if the proceedings were in respect of an offence, giving that word its usual significance of a breach of the criminal law. But unless persons found in a gaming or betting house are thereby committing an offence the police have, in strict law, no power to bail them and any recognisance that was entered into at the police station would be invalid and incapable of enforcement. It would follow also that the magistrates' court could not issue a warrant on non-appearance to such a recognisance because no information alleging an offence could be laid.

The only course which would appear open to the police if a defendant " jumped his bail " in these circumstances is to apply for a summons under section 43 of the Magistrates' Courts Act, 1952, which authorises this procedure " where a complaint is made . . . upon which a magistrates' court . . . has power to make an order against any person." It could be argued that the court has power to order a person found in a gaming or betting house to enter into a recognisance not to frequent such places in future or, more generally, to be of good behaviour. If a summons issued under this section is properly served, a warrant may be granted if the defendant does not appear to it and the complaint is substantiated on oath. But a person who did not surrender to the court after being bailed at the police station would probably be a person on whom it would prove impossible to serve a summons; so proceedings under section 43 would probably be of no avail in the end.

The police would undoubtedly be severely criticised if they did not bail persons with fixed addresses who were arrested in a betting or gaming house "raid," but it seems rather unsatisfactory that taking this very reasonable course has no legal sanction and could result in frustration of one of the purposes of the proceedings by an unscrupulous and knowledgeable defendant. Fortunately, it is very rare for a gamester or punter to abuse the consideration shown to him in this matter, and even if he does not appear to his bail in the first instance, he almost invariably, either of his own volition or as a result of police persuasion, surrenders himself later to the court and thereby averts any procedural difficulties. [A. E. JONES.]

## Summary Justice

### *Animals*

Dog. Being owner of a dog found worrying sheep, allowing dog out without a means of identification and keeping dog without a licence; fined £5 for the first offence, £3 for the second and £2 for the last; Jones: Chester City Magistrates' Court (*Liverpool Echo,* August 16).

### *Assault*

Passenger assaulting bus conductress, blow causing loss of sight of one eye; maximum sentence of six months' imprisonment imposed; Burke: Birmingham Magistrates' Court (*Manchester Guardian*, August 25).

### *Aviation*

Landing an aircraft at a Government aerodrome without permission; maximum fine of £200 imposed; Jones: Lymington Magistrates' Court (*The Times*, August 15).

### *Children*

Three boys, aged 16, 10 and 9, throwing stones and an applecore at a goods engine, one of the missiles knocking out the driver; two eldest fined £2 each, youngest 4s.; Nottingham Juvenile Court (*Manchester Guardian*, August 21).

### *Food and drugs*

Milk. Supplying milk not of the substance demanded by the purchaser; glass particles in bottle of milk; fined £25; Dale Dairy: Preston Magistrates' Court (*Manchester Guardian*, August 16).

### *Local by-laws*

Library. Failing to return two library books within seven days after a demand in writing; first prosecution under new by-law; fined £2; Hydes: Wallasey Magistrates' Court (*Liverpool Echo*, August 1).

Litter. Placing litter on the highway; man threw paper on road, but when questioned picked it up; fined £1; warning that future cases would be dealt with more severely; Ibbs: Ormskirk County Magistrates' Court (*Liverpool Echo*, August 31).

Litter. Dropping toffee bag on promenade; fined 50s.; warning that future cases would be dealt with more severely; Blackburn: Wallasey Magistrates' Court (*Liverpool Echo*, August 9).

Litter. Dropping tissue paper wrapper on promenade; fined £1; Eaton: Wallasey Magistrates' Court (different magistrates) (*Liverpool Echo*, August 16).

### *Mines*

Coal mine. Shot-firer failing to take proper safety precautions; gave signal for miners to return to coalface when charge had not gone off; fined £15, ordered to pay £5 5s. costs; Bowmer: Nottingham Magistrates' Court (*Manchester Guardian*, August 25).

### *Nuisance*

Using obscene language in market; fined £2; Sullivan: St. Helens Magistrates' Court (*Liverpool Echo*, August 13).

### *Road traffic*

Control of vehicle. Driving car in such a position that he could not have proper control over it; man driving with left arm in plaster; summons dismissed; Kerr: Bow Street Magistrates' Court (*Manchester Guardian*, August 10).

Obstruction. Two youths, aged 19 and 21, deliberately obstructing traffic by standing in the highway; playing a game called "za-za" in which they stood motionless among traffic until their nerve broke; each fined £2; Uzzell, Keenaghan: Bristol Magistrates' Court (*The Times*, August 16).

Appeal. Australian taking and driving away a motor-cycle without the owner's consent and using vehicle while uninsured; passage booked for return home; sentence of fourteen days' imprisonment quashed on appeal to quarter sessions and a fine of £14 imposed; Darby: London Sessions (*Manchester Guardian*, August 17).

# Case and Comment

The reports of cases to which initials are appended hereunder have been specially prepared for *The Criminal Law Review* by the following reporters:—

HENRY PALMER, *Barrister-at-Law*
J. D. PENNINGTON, *Barrister-at-Law*

**Architects**—*Registration—carrying on business in name, style or title of architect*

JACOBOWICZ *v.* WICKS [1] (Q.B. Divisional Court: Lord Goddard C.J., Ormerod and Donovan JJ.: July 13, 1956).

J. and another man, M., were Poles living in this country who after the war qualified at the Polish School of Architecture (transferred and affiliated to Liverpool University) for foreign diplomas in architecture called "Diplomierte Ingenieur Archietetk." They carried on business in partnership. Their business notepaper was headed "THIRD DIMENSION—Design Consultants." Their names also appeared on the notepaper in small print and under each name were the letters "Dipl. Ing. Arch.," the letters "Arch." being an abbreviation of the foreign word "architekt." The name "THIRD DIMENSION" was registered under the Registration of Business Names Act, 1916. Neither J. nor M. was registered as an architect in the Register of the Architects' Registration Council. Informations were preferred against them charging them with an offence under section 1 (1) of the Architects Registration Act, 1938, in that they, not being registered architects, were practising and carrying on business under a name, style or title containing the word "architect." The magistrate found J. and M. guilty of the offence charged but discharged them absolutely on payment of 15 guineas costs. On appeal to the Divisional Court:—

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[1] For the appellant: *L. J. Belcourt* (instructed by Merton Naydler). For the respondent: *Maurice Ahern* (instructed by Field, Roscoe & Co.).

*Held,* that the magistrate was right in holding that the letters "Dipl. Ing. Arch." formed part of the name, style or title under which J. and M. were carrying on business, but that although they had clearly taken a name, style or title which implied that they were architects they had committed no offence as section 1 (1) of the Act of 1938 only forbade the use of the word "architect" and it would be straining the meaning of the section to hold that an offence had been committed merely because this came within the mischief which the Act intended to prevent.

*Per* Lord Goddard C.J.: Had the section contained words similar to those used in the Architects (Registration) Act, 1931, the principal Act, which it was intended to extend, forbidding the practising or carrying on business by a person who was not a registered architect under any name, style or title implying that he was an architect, there would have been no question but that an offence would have been committed, but it was not for the court to construe an Act of Parliament which created an offence to bring within its ambit matters which the court thought ought to be offences.

[Mrs. E. M. Wellwood, *Barrister-at-Law.*]

COMMENTARY. This case was decided purely on its facts and the interpretation of the statutory provision. Penal statutes are construed strictly, any ambiguity being resolved in favour of the defendant.

See Stone, 88th ed., 449.

**Court of Criminal Appeal**—Fresh evidence. See R. *v.* JORDAN, p. 700, below.

**Courts-martial**—*Offence punishable by English law—careless driving—notice of intended prosecution*

R. *v.* JENNINGS [2] (Courts-Martial Appeal Court: Pilcher, Ormerod and Ashworth JJ.: July 30, 1956).

J. was convicted by a military court-martial in Germany of the civil offence of driving without due care and attention. He appealed against his conviction to the Courts-Martial Appeal Court on the ground that no notice of intended prosecution had been served on him as required by section 21 of the Road Traffic Act, 1930. It was contended on behalf of J. that the prosecution had been brought under section 41 of the Army Act, which makes it an offence against military law to commit any offence which, when committed in England, is punishable by the law of England; and that the offence of admitted careless driving was not punishable by the law of England because there was a failure to comply with the provisions of section 21.

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[2] For the appellant: *Melford Stevenson Q.C., D. Lloyd* (instructed by Lomer and Wheater). For the Crown: *Sir Harry Hylton-Foster, Q.C., S.-G., E. Garth Moore* (instructed by the Director, Army Legal Services).

*Held,* dismissing the appeal, that section 21 of the Road Traffic Act, 1930, is merely a procedural section and, as the offence of careless driving is an offence punishable by the law of England, the court-martial properly convicted J. of the offence, although the procedure provided for by that section had not been complied with.

[H. P.]

COMMENTARY. The decision that section 21 of the Road Traffic Act, 1930, is merely a procedural section seems strange at first in view of its wording, which provides that where a person is prosecuted for careless driving " he shall not be convicted " unless the prescribed notice has been given. But the actual offence of driving without due care and attention is created by section 12 (1) of that Act, and the offence exists whether or not prosecution is barred by section 21. In the present case, by virtue of section 41 of the Army Act, the accused had committed an offence against military law; the prosecution of the offender is conducted on a different basis and unless specifically applied by statute to such prosecutions, section 21 could have no relevance.

Section 41 is replaced by section 70 of the Army Act, 1955, which comes into force on January 1, 1957.

**Evidence**—*Corroboration.* See R. *v.* BURGESS, below.

**Indecent Assault**—*Assault on adult male person—corroboration*

R. *v.* BURGESS [3] (Court of Criminal Appeal: Pilcher, Ormerod and Ashworth JJ.: July 30, 1956).

B. was convicted at Middlesex Sessions of indecent assault on a male person and fined £10. The evidence at the trial was that the indecent assault had taken place in a cinema upon a police officer who was off duty. B. appealed to the Court of Criminal Appeal against his conviction on the ground that the chairman had failed to warn the jury of the desirability of the evidence of the police officer being corroborated.

*Held*, allowing the appeal, that it was undoubtedly the practice in cases of indecent assault upon adult male persons to tell the jury in summing-up that it was desirable that the evidence should be corroborated. In the opinion of the court it was just as desirable that the jury should be warned with regard to corroboration in a case of this kind as in any other indecent assault or sexual offence. In the present case, the jury were absent for a considerable time before they came to their decision and, had they been warned of the desirability of corroboration, B. might well have been acquitted. Accordingly, the conviction could not be upheld and the appeal would be allowed. [H. P.]

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[3] For the appellant: *J. Burge* (instructed by Beach & Beach). For the Crown: *W. G. Fordham* (instructed by the Solicitor, Metropolitan Police).

COMMENTARY. This case makes clear a point perhaps not entirely certain before, although there are a number of reported decisions on the necessity of corroboration where an indecent assault on a boy or youth by an adult male is alleged: see Archbold, 33rd ed., 1124.

### **Murder**—*Cause of death—wrong medical treatment of person injured by defendant*

R. *v*. JORDAN[4] (Court of Criminal Appeal: Hallett, Ormerod and Donovan JJ.: August 21, 1956) (*The Times*, August 22, 1956).

J., a coloured American airman, was convicted at Leeds Assizes of the murder of B. by stabbing him in the abdomen. The evidence at the trial was that the cause of death was that pneumonia followed the stab wound. On appeal against conviction to the Court of Criminal Appeal, it was contended on behalf of J. that the medical evidence at the trial was wrongly interpreted as meaning that the pneumonia was the natural consequence of the stab wound. It was conceded that B. was stabbed by J., and that B. died eight days afterwards, and no complaint was made as to the summing-up. However, it was submitted that the cause of death was not consequent on the stab wound inflicted, but was a result of B.'s treatment in hospital. The court was asked to hear further medical evidence and heard the evidence of two doctors.

*Held*, allowing the appeal, that it was only in the most exceptional cases that the court would hear additional evidence. The first requirement was that the evidence was not available at the trial. In the present case it did not occur to the judge, nor to counsel, nor to the jury, that there could be any doubt but that the stab caused the death. It was only subsequently that information reached the United States authorities which enabled the defence to put forward further evidence. The court were, therefore, of the opinion that the evidence was not in any true sense available at the trial. Before quashing a conviction after hearing fresh evidence the court must be satisfied that if the jury had heard the fresh evidence they would very likely or probably have come to a different verdict. In the present case, this court had heard two doctors give evidence that, in their opinion, the death was not caused by the stab wound but was caused by an antibiotic wrongly administered, and by the wrongful introduction of large quantities of liquid intravenously. The question of causal connection would have been a question of fact for the jury, and on the question whether the fresh evidence would have affected the jury's decision, the court felt that, if the jury had heard the evidence of the two doctors, they would have hesitated to take a contrary view. Accordingly, the appeal would be allowed. [H. P.]

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[4] For the appellant: *Geoffrey Veale Q.C., R. R. Rawden-Smith* (instructed by Payne & Payne, Hull). For the Crown: *J. S. Snowden* (instructed by the Director of Public Prosecutions).

COMMENTARY. This case follows well-established authority on both points. The Court of Criminal Appeal has authority to hear fresh evidence under section 9 of the Criminal Appeal Act, 1907, but it is a power rarely exercised. For cases where it has been, see Archbold, 33rd ed., 330, and in particular *R.* v. *Harding* (1936) 25 Cr.App.R. 190.

After hearing fresh evidence the test which the court applies in deciding whether to allow an appeal is the same as that laid down in *R.* v. *Haddy* [1944] K.B. 442, in considering whether the proviso to section 4 (1) of the Act of 1907 should be applied: *R.* v. *Collins* (1950) 34 Cr.App.R. 146.

In *R.* v. *Holland* (1841) 2 M. & Rob. 351, in which it was contended that the cause of death was not the wound inflicted by the prisoner, but the obstinate refusal of the deceased to submit to proper medical treatment, Maule J. held that this was no defence; if the wound was ultimately the cause of death, the prisoner was guilty of murder. It could be argued in the present case that the wound was the ultimate cause of death, but the court adopted a more merciful view than was followed in earlier cases, such as *R.* v. *Holland* and *R.* v. *Davis* (1883) 15 Cox 174, and in a more recent South African case, *R.* v. *Mubila* [1956] Crim.L.R. 513.

See Russell on *Crime*, 10th ed., 475.

After a full investigation the Hospital Board concerned have approved a report vindicating the hospital staff in the treatment of the deceased in this case: see *The Times*, September 14, 1956.

**Road Traffic**—*Notice of intended prosecution.* See R. *v.* JENNINGS, p. 698, above.

**Sentence**—*Wrongful conviction on one count of indictment—substitution of sentence by Court of Criminal Appeal on another count*

R. *v*. LOVELOCK[5] (Court of Criminal Appeal: Lord Goddard C.J., Ormerod and Ashworth JJ.: July 24, 1956) ([1956] 3 All E.R. 223n.).

L. was convicted at Leicester Assizes of attempted rape of a child under the age of 13. He pleaded guilty to a second count of indecent assault on the same child. He was sentenced to six years' imprisonment on the first count and to two years' imprisonment on the second count, the sentences to run concurrently. L. was eligible for preventive detention. On appeal to the Court of Criminal Appeal against his conviction of attempted rape:—

*Held*, allowing the appeal, that there was no evidence of an intended rape, although it was as foul a case of indecent assault as had ever come before the court. It was one of those cases which called loudly for the intervention of the legislature with regard to increasing the maximum sentence of two years' imprisonment. However, the provisions of section 5 (1) of the Criminal Appeal Act, 1907, appeared to apply in the clearest possible manner to this case. L. had been properly convicted on the second count and, as the necessary notices had been served and the convictions proved, a sentence of preventive detention could have been passed upon him at the trial. In the circumstances, the court would invoke section 5 (1) and would pass a sentence in substitution for the sentence on count 2 of six years' preventive detention. [H.P.]

COMMENTARY. Where it appears to the Court of Criminal Appeal that an appellant though not properly convicted on some count or part of an indictment has been properly convicted on another count or part, it may either affirm the sentence passed at the trial or substitute another sentence warranted by that count or part of the indictment on which the appellant was properly convicted: section 5 (1) of the Criminal Appeal Act, 1907.

There appears to be no reported case in which the powers conferred by this subsection were specifically exercised and in giving judgment Lord Goddard C.J. said that so far as his experience went he had never known this subsection to be put into force.

The Court of Criminal Appeal criticised the maximum sentence of two years' imprisonment for attempted unlawful carnal knowledge of a girl under the age of thirteen in *R.* v. *King* [1954] Crim.L.R. 381. At that time the Home Secretary, in reply to a question in the Commons, said that he had noted the criticism of the court but did not know when it would be possible to introduce legislation on the matter (H.C. Debates, Vol. 525, col. *227*; April 1, 1954). The punishment has not been altered by the Sexual Offences Act, 1956, which recently received the Royal Assent (see p. 709, below).

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[5] For the appellant: *B. D. Bush* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *J. Ross* (instructed by J. M. Johns, Rugby).

# Acts and Orders

## Armed Forces

VISITING FORCES (DESIGNATION) (COLONIES) (AMENDMENT) ORDER, 1956 (S.I. No. 1368): operative August 30, 1956. The Order of 1954 (S.I. No. 637; [1954] Crim.L.R. 558) is amended so as to extend the provisions of the Visiting Forces (Designation) Order, 1954 (S.I. No. 634; [1954] Crim.L.R. 558) to Cyprus in so far as they relate to France.

## Birds

WILD BIRDS (SUNDAYS) ORDER, 1956 (S.I. No. 1310): operaative September 1, 1956. The administrative counties of Brecknock, Cardigan, Denbigh and Merioneth are declared prescribed areas for the purposes of section 2 (2) of the Protection of Birds Act, 1954 ([1954] Crim.L.R. 638). It is an offence to kill or take or to attempt to kill or take any wild bird included in Sched. III to the Act on Sundays in any of those areas.

For penalties for contraventions, see section 12 of the Act.

## Civil Aviation

AIR NAVIGATION (THIRD AMENDMENT) ORDER, 1956 (S.I. No. 1212): operative August 17, 1956. The Order of 1954 (S.I. No. 829; [1954] Crim.L.R. 640) is further amended. The changes relate to smoking in aircraft, the carriage of persons on parts of aircraft or attachments thereto, the Visual Flight Rules, manoeuvring areas of land aerodromes and lights on aircraft flying at night.

## Customs and Excise

EXPORT OF GOODS (CONTROL) (AMENDMENT NO. 7) ORDER, 1956 (S.I. No. 1255); operative August 16, 1956. The export to Egypt of airframe parts, spares and components and aero engine parts, spares and components is prohibited except under licence.

For penalties for contraventions, see section 3 of the Import, Export and Customs Powers (Defence) Act, 1939.

### Emergency Laws

CONTROL OF PAPER (NEWSPAPERS) (ECONOMY) (AMENDMENT No. 5) ORDER, 1956 (S.I. No. 1233): operative August 19, 1956. The maximum number of pages which newspapers may contain during the period of the sixteen weeks from August 19, 1956, to December 8, 1956, is prescribed.

For penalties for contraventions, see regulation 92 of the Defence (General) Regulations, 1939.

### Food and Drugs

FLOUR (REVOCATION) ORDER, 1956 (S.I. No. 1182); FLOUR (COMPOSITION) REGULATIONS, 1956 (S.I. No. 1183): both operative September 30, 1956. The Flour Order, 1953 (S.I. No. 1282), which contained requirements as to the composition of National and other flours, the marking of containers and keeping of records of manufacture and importation, is revoked but without prejudice to any proceedings for its contravention. New requirements are laid down as to the composition of flour and no person may sell, offer or expose or have in his possession for sale, consign or deliver any flour which does not comply with these requirements. This does not apply to any sale, consignment or delivery of flour to the Minister of Agriculture, Fisheries and Food, or to any person authorised to purchase the flour on his behalf, for stockpiling or experimental purposes; for use in the manufacture of certain prescribed articles; for use in hospitals for the purposes of diagnosis, treatment and research; or for export outside the United Kingdom. Each food and drugs authority is to enforce the Regulations in their area. The penalties for contravention of the Regulations are a maximum fine of £100 or imprisonment for not more than three months or both and in the case of a continuing offence, a further maximum fine of £5 for each day on which the offence continues after conviction.

SALE OF FOOD (WEIGHTS AND MEASURES: BACON AND HAM) REGULATIONS, 1956 (S.I. No. 1165); PRE-PACKED FOOD (WEIGHTS AND MEASURES: MARKING) (AMENDMENT NO. 2) REGULATIONS, 1956 (S.I. No. 1201): both operative January 27, 1957. Provisions in the Sale of Food (Weights and Measures) Act, 1926, relating to the sale of bacon and ham are replaced and the Pre-Packed Food (Weights and Measures: Marking) Order, 1950 (S.I. No. 1125) no longer applies to them. Bacon and ham must be sold by net weight except where the wrapper does not exceed a prescribed weight. If pre-packed they must be marked with an indication of net weight, or where sale by gross weight is allowed, of gross weight. If not pre-packed a legible statement of the net weight of the bacon or ham, or where permitted, of the weight of the bacon or ham with its container, must be delivered to the purchaser, unless delivery is made to the purchaser on or at the premises of the seller immediately after the bacon or ham has been weighed in the presence of the purchaser.

For penalties for contraventions, see section 11 of the Sale of Food (Weights and Measures) Act, 1926.

BREAD (AMENDMENT NO. 2) ORDER, 1956 (S.I. No. 1181): operative September 30, 1956. Price control on bread is abolished. Records of flour usage and the production and sale of bread need no longer be maintained, but existing records are to be kept for one year from the date of the transactions to which they relate.

### Hire-Purchase

CONTROL OF HIRING (NO. 2) ORDER, 1956 (S.I. No. 1269): operative August 21, 1956. The previous Order of 1956 (S.I. No. 179; [1956] Crim.L.R. 279) is revoked and replaced. The principal changes are that apart from specified exceptions the hiring of goods to which the Order applies must now be for a definite period of not less than nine months or for an indefinite period and the charges payable for or in connection with any services (other than the supply of electricity or gas), to be performed in relation to the goods subject to the agreement must be ascertainable at the date of the signing of the relevant agreement.

For penalties for contraventions, see regulation 92 of the Defence (General) Regulations, 1939.

HIRE-PURCHASE AND CREDIT SALE AGREEMENTS (CONTROL) (AMENDMENT) ORDER, 1956 (S.I. No. 1270): operative August 21, 1956. The previous Order of 1956 (S.I. No. 180; [1956] Crim.L.R. 279) is amended. The provisions for credit sale agreements in respect of goods for which payments on account are made during manufacture are modified and are extended to cover shop and office furniture and fittings, other than furniture of a type suitable for domestic use, and mechanically propelled vehicles and chassis and sidecars. Where such contracts for fixed and movable plant, machinery, appliances, equipment and apparatus of all types, and parts thereof, not specified in any item of Schedule I to the principal Order, provide for installation, the Order will not apply to the agreements, provided payments on account are to be made by the purchaser during or before installation of those goods and payment of not less than 70 per cent. of the total amount payable is to be made before the expiry of six weeks from the date of the substantial completion of the installation of those goods and of not less than 95 per cent. of that amount before the expiry of two years from that date. The exemption of certain short-term credit sale agreements will now apply only to those in which the property in the goods passes to the buyer before delivery of the goods to him. The provisions relating to goods for export are modified.

For penalties for contraventions, see regulation 92 of the Defence (General) Regulations, 1939.

### London

The following Order has been made prohibiting waiting: S.I. 1956, No. 1330 (Holly Bush Lane, Sevenoaks).

The following Orders have been made detailing prescribed routes: S.I. 1956, Nos. 1378 (Islington); 1379 (St. Marylebone).

### Merchandise Marks

MERCHANDISE MARKS (IMPORTED GOODS) NO. 1 ORDER, 1956 (S.I. No. 1216): operative November 3, 1956. Oil burning appliances specified in the Schedule to the Order may not be sold or exposed for sale in the United Kingdom unless they bear an indication of origin stamped or embossed on the article itself or on a metal label soldered or riveted to it or applied to the article or to such a label by means of a transfer. Where such appliances are ready packed in containers, the containers must also bear an indication of origin. These requirements do not apply at the time of importation or at the time of exposure for sale wholesale by a wholesale dealer.

For penalties for contraventions, see section 5 of the Merchandise Marks Act, 1926.

### Merchant Shipping

MERCHANT SHIPPING (SAFETY CONVENTION COUNTRIES) (VARIOUS) (NO. 2) ORDER, 1956 (S.I. No. 1213): operative August 14, 1956. Brazil and Venezuela have accepted the Safety Convention.

### Pensions

INCREASE IN PENSIONS (MODIFICATION) REGULATIONS, NO. 1 (S.I. No. 1240); No. 2 (S.I. No. 1241); No. 3 (S.I. No. 1239): all operative August 20, 1956. These Regulations concern pensions in respect of judicial service under the Sheriff Courts (Scotland) Act, 1907, those of stipendiary magistrates and those of police respectively.

POLICE PENSIONS (NO. 2) REGULATIONS, 1956 (S.I. No. 1158); SCOTLAND (S.I. No. 1180): both fully operative August 6, 1956. Amendments are made in relation to widows' pensions and children's allowances.

## Police

As to pensions, see above.

## Revenue

CONTROL OF BORROWING (AMENDMENT) (NO. 2) ORDER, 1956 (S.I. No. 1190): operative August 2, 1956. Subject to certain exemptions a body corporate may not, without the consent of the Treasury, issue any securities where the whole or any part of the consideration for the issue is the transfer of any property unless the property consists of, or forms part of, the assets of an undertaking which is being sold to the body corporate or the property consists of the securities of another body corporate.

For penalties for contraventions, see rule 1 of the Schedule to the Borrowing (Control and Guarantees) Act, 1946.

## Road Traffic

ROAD TRAFFIC ACT, 1956 (4 & 5 Eliz. 2, c. 67): operative on a day to be appointed. See [1956] Crim.L.R. 608 and pp. 673–679, above.

FINANCE ACT, 1956 (4 & 5 Eliz. 2, c. 54): operative August 2, 1956. Section 5 amends the Vehicles (Excise) Act, 1949. As from January 1, 1957, the definition of a tower wagon for the purposes of the Act will no longer be restricted to vehicles used for the purposes of electricity or gas undertakings or electric transport undertakings, and the duty chargeable on mobile concrete mixers will be altered. The Minister of Transport and Civil Aviation is given power to vary or revoke an order made under section 11 prescribing periods of less than a year for which vehicle licences may be taken out on payment of duty at reduced rates; different periods and rates may be prescribed for vehicles of different descriptions. Proceedings for offences under the Act of 1949 may be instituted by the council of a county or county borough and in the case of offences under section 13 or 15 (*c*), which relate to the use of vehicles without a licence or proper licence, no proceedings may be instituted except by such a local authority or by a constable with the consent of the local authority, and proceedings may be instituted at any time within three years from the date on which the offence was committed. This provision does not apply to Scotland, but a local authority there may institute proceedings otherwise than on indictment for an offence under section 13 or 15 (1) and such proceedings may be instituted at any time within three years from the date on which the offence was committed.

MOTOR VEHICLES (AUTHORISATION OF SPECIAL TYPES) ORDER, 1956 (S.I. No. 1265): operative August 27, 1956. Regulation 33 of the Motor Vehicles (Construction and Use) Regulations, 1955 (S.I. No. 482; [1955] Crim.L.R. 393), limits the overall width of a motor tractor to 7 feet 6 inches. The use on roads of motor tractors exceeding this width, constructed or adapted for use as grass-cutters or hedge-trimmers, is authorised where such vehicles are actually engaged in grass-cutting or hedge-trimming operations.

The Motor Vehicles (Authorisation of Special Types) General Order, 1955 (S.I. No. 1038; [1955] Crim.L.R. 584), is amended. Straddle carriers may be used on roads when proceeding to or returning from a manufacturer or repairer for repair or overhaul. Combine harvesters require only one attendant if the overall width exceeds 8 feet but does not exceed 11 feet (instead of 9 feet as previously). Notice need only be given to the police when a combine harvester of more than 9 feet 6 inches overall width (not 8 feet as previously) makes a road journey of more than five miles. Regulation 8 of the Construction and Use Regulations, which concerns variation of wheel load, does not apply to a machine designed for use and used solely for the purpose of laying materials for the repair or construction of road surfaces, if the weight transmitted to the road surface by any two wheels in line transversely does not exceed 11 tons. Vehicles used for civil aviation purposes and which are the property of, or at the time under the control of, the Minister of Transport and Civil Aviation are exempted from regulations 33 (overall width, motor tractors), 37, 38 (overall width and overhang, heavy motor-cars), 54, 55 (overall length and brakes, trailers) of the Construction and Use Regulations.

For penalties for contraventions, see sections 111 (3) and 113 of the Road Traffic Act, 1930.

## Scotland

*Food and drugs*

FOOD STANDARDS (TOMATO KETCHUP) (SCOTLAND) AMENDMENT REGULATIONS, 1956 (S.I. No. 1353): operative October 1, 1956. Provision is made similar to that in the English Regulations (see [1956] Crim.L.R. 643).

MINERAL OIL IN FOOD (AMENDMENT) (SCOTLAND) REGULATIONS, 1956 (S.I. No. 1294): operative September 1, 1956. Provision is made similar to that in the English Regulations (see [1956] Crim.L.R. 134).

*Harbours, docks and piers*

CARRADALE HARBOUR ORDER, 1956 (S.I. No. 1267): operative August 13, 1956. The county council of Argyll is given power to execute certain works. Anybody who obstructs any person acting under the authority of the county council in setting out the lines of the works or who pulls up or removes any poles or stakes driven into the ground for the purpose of such setting is liable on summary conviction to a maximum fine of £5.

*Marriage*

MARRIAGE (SCOTLAND) ACT, 1956 (4 & 5 Eliz. 2, c. 70): operative August 2, 1956. This Act alters a requirement concerning residence before marriage.

*Pensions*

See p. 707, above.

## Sea Fisheries

SEA-FISHING INDUSTRY (FISHING NETS) (AMENDMENT) ORDER, 1956 (S.I. No. 1202): operative September 1, 1956. The previous Order of 1956 (S.I. No. 531; [1956] Crim.L.R. 434) is amended. Nets of the larger mesh prescribed in the Order will not now be required until April 5, 1958. Previously the date was April 5, 1957.

## Sexual Offences

SEXUAL OFFENCES ACT, 1956 (4 & 5 Eliz. 2, c. 69): operative January 1, 1957. This Act consolidates the statute law relating to sexual crimes. It concerns intercourse by force, intimidation, etc., with girls under sixteen, and with defectives, incest, unnatural offences, assaults, abduction, prostitution, procuration, etc., solicitation and suppression of brothels. The mode of prosecution and punishment for each offence are set out in a table contained in the Second Schedule to the Act.

## Trade and Industry

RESTRICTIVE TRADE PRACTICES ACT, 1956 (4 & 5 Eliz. 2, c. 68): operative August 2, 1956. This Act provides for the regulation of restrictive trading agreements. The Registrar of Restrictive Trading Agreements may by notice require certain information (s. 14) and anyone without reasonable excuse failing to comply with such a notice is liable on summary conviction to a maximum fine of £100 (s. 16 (1) ). If a person makes any statement or furnishes any document which he knows to be false in a material particular or recklessly makes any statement or furnishes any document which is false in a material particular or wilfully alters, suppresses or destroys any document which he is required to furnish, he is liable on summary conviction to imprisonment for not more than three months or a maximum fine of £100 or both; on conviction on indictment he is liable to imprisonment for not more than two years or a fine or both (s. 16 (2) ). Where a person is convicted of failing to supply information and the default continues after conviction, he is liable on summary conviction to a maximum fine of £100 or of £10 for every day on which the default continues within the three months following his conviction, whichever is the greater (s. 16 (3) ). Where an offence is committed by a body corporate and is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of any director, manager, secretary or other similar officer or any person purporting to act in such a capacity, he is liable to the same penalties (s. 16 (4) ). No proceedings may be instituted in England and Wales except by or with the consent of the Director of Public Prosecutions or the Registrar (s. 17 (1) ). An information may be laid at any time within three years after the commission of the offence and within twelve months after the date on which evidence sufficient in the opinion of the Director of Public Prosecutions or the Registrar comes to his knowledge. A certificate of the Director of Public Prosecutions or the Registrar as to the date on which such evidence came to his knowledge is conclusive evidence (s. 17 (2) (4) ). Similar provisions are made in relation to Scotland and Northern Ireland.

It is expressly provided that no criminal proceedings will lie against a person contravening the prohibition of agreements for collective enforcement of conditions as to resale prices (s. 24 (6) ).

Restrictions are placed on the disclosure of information obtained under or by virtue of the Act. For contravention of these restrictions the penalties are on summary conviction imprisonment for not more than three months or a maximum fine of £100 or both and on conviction on indictment not more than two years' imprisonment or a fine or both (s. 33).

### Weights and Measures

See SALE OF FOOD (WEIGHTS AND MEASURES) REGULATIONS, p. 704, above.

## *Practical Problems*

*All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 3 Chancery Lane, London, W.C.2." The questions of subscribers only are answerable in the Review. All questions should be submitted in duplicate. The Publishers cannot accept any responsibility for the correctness of the replies.*

### 18. *Jurisdiction to issue summons*

A motorist commits a road traffic offence in town " A " and he is not known. The owner of the vehicle is traced and he resides in town " B," where he is interviewed on behalf of the chief officer of police of town " A." He refuses to give the name and address of the driver. (Maybe owner-driver.) The driver is not traced.

Process is applied for in town " A " in respect of the owner of the vehicle refusing to disclose the identity of the driver, contrary to section 113 of the Road Traffic Act, 1930. The place of the offence committed by the owner of the vehicle is shown as town " B." The clerk to the magistrates refuses to issue process on the grounds that the magistrates have no jurisdiction. It should be stated that the chief officer of town " A " (a chief constable), has no authority in town " B," where the chief officer is a superintendent of a county force.

Section 1 (2) (*b*) of the Magistrates' Courts Act, 1952, does not seem to apply as there is only one defendant.

I know an information can be laid before magistrates in town "B," but it would mean the informant having to travel from "A" to "B" to prosecute.

I should like your opinion on this. [A. W. S.]

### ANSWER

Section 2 (1), Magistrates' Courts Act, 1952, states that a justice of the peace for a county or a borough shall have jurisdiction to issue a summons for any offence committed within the county or the borough. Section 126 (the interpretation section) of the same Act makes it clear that the term "county" includes any borough within the county which has not a separate commission of the peace with exclusive jurisdiction. This means that a justice of the peace for a county has jurisdiction in any borough within the county which has no separate commission of the peace, and a justice of the peace for a borough has jurisdiction throughout the county.

If, therefore, both town "A" and town "B" are within the same county, and neither "A" nor "B" has a separate commission of the peace, it would appear that justices of "A" could issue process in the circumstances outlined by the correspondent.

Since, however, town "A" has its own police force, it almost certainly has its own commission of the peace excluding the jurisdiction of the county justices. If this is so, or if town "B" has a separate commission of the peace, or if "A" and "B" are not within the same county, then the justices of town "A" do not have jurisdiction to issue process unless, as is not the case here, there are two defendants, so that section 1 (2) (*b*), Magistrates' Courts Act, 1952, can operate.

Curiously enough, however, although the justices of town "B" probably do not have jurisdiction to issue a summons in the circumstances put forward, they may find themselves with jurisdiction to try the case summarily, if the owner were, by some means or other, before them. Section 2 (3) and (4), Magistrates' Courts Act, 1952, provides that a magistrates' court for a county or borough shall have jurisdiction as examining justices over any indictable offence committed by any person before the court, whether or not the offence was committed within the county or borough concerned; and if the offence is triable summarily they may proceed under section 18 (3) or section 19 of the Magistrates' Courts Act, 1952, to summary trial.

This, however, is by the way. We think that the correspondent has argued soundly and that the informant will have to travel from "A" to "B" to institute proceedings. [N. W.]

# *Letters to the Editor*

## The Female Prostitute

Sir,

I would like to comment on the article entitled "The Female Prostitute" [1956] Crim.L.R. 611. The point made that prostitution must be studied in the perspective of female promiscuity cannot be overstressed. Some may see this as an obvious reference but it appears to be unknown—or considered unimportant—in many investigations into the problem of prostitution.

The author accepts Lombroso's concept that prostitution is the female equivalent of crime and, in support of this dictum, he quotes a recent study to indicate an inverse proportion between the incidences of female crime and prostitution among women who became prostitutes. He states, however, that this is not the case where prostitution is organised because the organisers also encourage other criminal practices. Thus, it would seem that females who are more likely to resort to other crimes are either non-prostitutes or organised prostitutes and that the converse holds for the non-organised prostitute. Does this not mean that "female crime is replaced by 'non-organisation'" rather than prostitution?

I find it difficult to accept that this anarchy successfully inhibits tendencies towards the related crimes of larceny, blackmail, etc. A prostitute in either category overtly demonstrates her rejection of a fundamental conformity required for survival in all of our orthodox social groups. Professional success depends upon her ability to publicise her non-conformity and I think this psycho-social conditioning is hardly likely to lead to greater respect for the peace of mind and property rights of her covert and furtive clientele. That she is emotionally indifferent to the client as an individual may be inferred from the combined elements of promiscuity and monetary payment mentioned by Mr. Cowan when defining the prostitute.

It is probable that opportunities for successful crimes frequently occur for the prostitute *qua* prostitute. Clients will doubtless include a relatively high proportion of those whose wits are dulled by alcohol and a very much higher proportion of likely victims who would avoid the risk of publicity at almost any price. I would need to be convinced that the recognition of such opportunism is the prerogative of the organised prostitute.

I was most interested in Mr. Cowan's opinions that full employment suggested that the motive for prostitution was not likely to be one of economics and that a reduction in the national economic situation might produce an increase in the number of prostitutes. I must point out that these opinions are contrary to the findings of outstanding researches into this aspect of the problem—as they are also to the economic law of supply and demand. Evidence supports that crimes against property increase and sex offences decrease during depressions. Conversely, booms produce a relative decrease in property crimes and an increase in sex offences.

Booms and depressions affect the social movements and relationships of the individual. Income levels will dictate the proportions to be spent on the various pleasures of clothes, drink and the pursuit of sex interests, etc. I suggest, therefore, the increased incomes that can be expected in conditions of full employment are likely to produce additional demands for the service offered by the prostitute. This demand will attract more into the profession to supply the clients' needs—and for an income many times greater than the average earnings of most women in legitimate employment. It would follow that in conditions of depression reduced demand would decrease supply as a consequence.

Yours faithfully,
G. W. Lynch,
Lecturer in Criminology.

*London.*

Sir,

I read with amazement the article "The Female Prostitute" [1956] Crim.L.R. 611.

I am not particularly shocked by the fact that there are prostitutes. I do regret that a member of my profession should seek to explain their conduct by psychiatric nonsense derived from Freud which surely should be spelt Fraud or Kant which must be Cant. I fail to believe that a prostitute takes money as "part of her aggression," or that she regards her customer as a temporary substitute for her father by which I translate the words "transient father surrogate." It is much more likely that she regards the surrender of her body for lewdness as a pleasant way of earning a living.

I am equally unconvinced by the proposition that the male fornicator regards payment of money as an assuagement of his guilt. Surely he is paying for what he gets.

I have regarded the *Criminal Law Review* as an attempt to provide an analysis, a report and a basis for discussion of the criminal law, and not a journal for the advancement of psychiatric humbug. Surely we can leave this to the medical journals.

Yours faithfully,
F. G. Hails,
Clerk to the Justices.

*Dartford, Kent.*

## Magistrates' Courts—Submission of No Case to Answer

Sir,

Recently when—at the close of the case for the prosecution before a magistrates' court in the country—I rose to submit on behalf of my client that there was no case to answer, I was "put to an election either to rest (my) case upon the submission or to call evidence" (Stone's *Justices' Manual*, 88th ed., p. 238).

All the authorities thereat cited, however, are civil cases and the indicated procedure is not, in my respectful submission, intended for the criminal side of our summary jurisdiction. For one thing, it is not followed on indictment; for another, it would preclude a defendant from exercising his right of giving evidence on his own behalf or making an unsworn statement, in face and defiance of the following clear terms of the Criminal Evidence Act, 1898, s. 1:

> " Every person *charged* with an offence . . . *shall* be a competent witness for the defence *at every stage of the proceedings*, whether the person so charged is charged solely or jointly with any other person. . . . Nothing in this Act shall affect . . . any right of the person *charged* to make a statement without being sworn."

Yours faithfully,

JOSEPH YAHUDA

Barrister-at-Law.

*Temple.*

# Books and Periodicals

*The Right to Counsel in American Courts.* By William M. Beaney. University of Michigan Press. London: Geoffrey Cumberlege. 1955. xi and 235 and (appendices, bibliography, tables and index) 32 pp. (36s. net.)

This book is an admirable illustration of how a subject which remains straightforward in England can become immensely complicated in America. Cases involving the right to counsel are very rare here, but Mr. Beaney cites over 500 cases, most of them modern, on that subject in America. Why does this happen? The answer, of course, is to be found primarily in the existence in America of a federal system with forty-nine written constitutions, all but one of them affording a guaranteed right to accused persons. The Sixth Amendment to the United States Constitution provides that every person " shall be allowed to make his full defence by counsel. . . ." The Supreme Court has recently interpreted this to mean that a conviction will be upset unless the accused either had, or waived, the assistance of counsel; and an accused is not deemed to have waived his right unless the court advised him of it or he can be shown to have had knowledge of it from elsewhere.

But the Sixth Amendment applies only to the federal courts. The state courts are governed by the terms of their own constitutions (only Virginia has no constitutional rule on the point), statutory provisions, and court rules. Naturally the position varies considerably from state to state but, in general, the right is less extensive than in the federal courts, being limited to the right to retain counsel. The states are not by any means entirely free agents in the matter, for the Fourteenth Amendment, which *does* apply to the states, condemns convictions contrary to " due process of law." The Supreme Court has held that due process involves a right to counsel, a lesser right, apparently, than that afforded by the Sixth Amendment, but one which, nevertheless, the state courts have often failed to afford.

Mr. Beaney has made a very painstaking and competent examination of the subject; but the discussion of a large number of cases in which the stated facts differ to only a small extent, if at all (the result of the American practice of reporting all cases which go to appeal?) makes tedious reading.

J. C. SMITH.

*Alphonse Bertillon.* Father of scientic detection. By Henry T. F. Rhodes. London: George G. Harrap & Co. 1956. 219 and (appendices, references and index) 19 pp. (15s. net.)

The book is divided into four parts. Part One shows how his father (Louis Adolphe), a qualified doctor, became interested in anthropology and developed a system of criminal anthropometry which ultimately led to the formation of the Society and School of Anthropology in which Louis Adolphe became an active member.

Part Two deals with his early life—rather a problem child at school; his educational record up to eighteen years of age—a total loss. He came to England first as a bank clerk and later as a teacher of French, returning to France as a Conscript, after which his somewhat aimless life took a definite turn. The methods of the French police interested him and he realised that the problem of identification was almost entirely neglected.

Part Three describes how he developed a system of identification, the importance of statistical card indexes, photographs, anthropometric measurements and ultimately of finger prints. His methods at first met with obstruction, but ultimately were bound to succeed, Bertillon being regarded as the man to first discover scientific means of identifying a person. Bertillon's association with such cases as "The Tragedy of the Drummond Castle," the "Dreyfus Case," is described.

Part Four reviews the wide recognition of his works and the honours bestowed on him. This section includes an account of Bertillon's part in the case of "The Grand Duchess."

The author has gone to great pains to collect his material, to produce a volume which is an interesting contribution to the literature of crime detection, and in particular the problem of "identification." His presentation, in parts, seems to be rather laborious and a little obscure and is not likely to appeal to the general reader. Nevertheless, those interested in crime detection will find it a very interesting book.

J. B. FIRTH.

*Crime and Social Action.* By George Godwin. London: Watts & Co. 1956. vi and 268 and (bibliography and index) 8 pp. (18s. net.)

The author of this book is widely read and has a considerable knowledge of the literature on certain aspects of the criminal and of prison treatment. Although many parts of this book will be most useful, it is difficult to understand what is the author's underlying purpose. The style of writing, especially in the earlier chapters, inclines to be popular, by which is meant that he uses dramatic methods of introducing his points. This is all the more strange, since the handling of some of the chapters in Part 2 " The Criminal: Can He Be Cured?", especially those relating to Bentham, Romilly and Osborne, is excellent both in expression and content.

The method used is to describe, first, a number of theories expounded by criminologists, followed in Part 2 by a discussion which is in essence concerned with the treatment of the criminal in prison. The final chapters on prevention are disappointing, since here the author tends to concentrate on the detection of the crime rather than upon social action for the prevention of its occurrence. The point of departure in respect of each theory, reform or practical contribution to detection is the man who propounds it. It would seem to follow that the author is firmly underlining the fact that social action, in relation to crime and treatment of the criminal, is invariably hinged upon the energy and conviction of an individual who succeeds in obtaining acceptance for his views.

In addition, there is a section dealing with " Murder and Madness " which entails consideration of the much discussed McNaghten rules and capital punishment. These are topical problems and have been so fully written up that it would have seemed preferable to omit them and to expand some other chapters, for instance, those relating to the theories of crime.

The book should prove useful to anyone wanting a simple introduction to the work of some well-known criminologists and reformers of the prison system.

T. E. JAMES.

*Borstal and Better.* By Richard P. Maxwell. London: Hollis & Carter. 1956. 216 pp. (16s. net.)

This is the autobiography of a vain vagabond whose roving parents, defeated by circumstances, were constantly on the move from one squalid area to another.

Early in life, Maxwell became a light-fingered thief. After a long run, he was found guilty by a juvenile court on twelve charges. At an approved school the acknowledged kindness of the headmaster had remarkably little influence upon him. Directly he was out, Maxwell stole again. His parents stood by him whenever he went wandering over large tracts of the country, usually ending up in police custody. He met with much kindness, only kept jobs for short periods, and when short of cash easily resorted to stealing. He underwent a long training at Borstal but that did not deter him. Neither did a scantily described period of probation. He underwent prison sentences of increasing duration. Eventually, at the settled age of thirty-eight, he now states categorically that " crime does not pay."

Maxwell could have told us so much more about prison and the obviously inadequate after-care. He prefers to detail his aimless wanderings. The result is a mediocre egotistical story, with neither form nor the pungent comments on the penal system which one might have expected from the title.

JEAN GRAHAM HALL.

*Reflections on Hanging.* By Arthur Koestler. London: Victor Gollancz, Ltd. 1956. 170 and (appendices, references and index) 23 pp. (12s. 6d. net.)

Mr. Koestler's approach to capital punishment is openly partisan. His solution is abolition and his recommendation is to the effect that the sadistic impulses, "at the bottom of every human heart," should not be denied but accepted as part of the human condition and kept under control (pp. 167 and 168). Whatever the opinion of the reader on this emotional problem of capital punishment, the book leaves the impression that the author does not do justice to the difficulties of "accepting" the retributive and sadistic impulses in the public.

The opening chapter is the most carefully argued and documented part of the book. The picture of the use made of the death sentence in the eighteenth and early nineteenth centuries is carefully drawn, even to the point of clearing up the common confusion of Samuel Romilly, the reformer, who committed suicide in 1819, with Lord Romilly M.R., who was active in the latter half of the same century.

This is a book written on the instance of strong personal feeling and will certainly appeal to those who agree with the author. Owing to a tendency to take the arguments of the opponents at their mere face value, without considering what lies behind them, it is doubtful whether the large body of apathetic and unconvinced members of the public will be persuaded.

T. E. James.

*Thirty Who Were Tried.* By Leslie Hale, M.P. London: Victor Gollancz, Ltd. 1955. 304 pp. (18s. net.)

A well-known textbook on Constitutional Law used to contain, in its preface, the warning that "Constitutional Law is too often the happy hunting-ground for lawyers with political axes to grind." After reading *Thirty Who Were Tried* it is difficult to avoid the conclusion that Mr. Hale is the converse, a politician with a legal axe to grind. The thread which links the cases described in this book is that of the liberty of the subject versus oppression by the State, and the author seeks to show, by the example of many significant cases, how and why justice may miscarry, particularly where the prevailing atmosphere of a trial has been so loaded with hatred, fear or suspicion as to make the acquittal of the accused virtually impossible. The trials of Titus Oates, John Wilkes, William Hone, some of the Communist "witch-hunting" trials in the United States, a few "iron-curtain" trials, trials of subject peoples by their rulers, the "war trials" at Nuremberg and elsewhere; these are just a few of the numerous cases drawn on by the author to illustrate his theme. The notes on the dust jacket tell us that the book is "an inspiring record of the continuous struggle for liberty and justice," and, indeed, the subtitle of the book is "Eternal Vigilance," but the danger of this book is that it could be regarded as little more than a record of cases where injustice has, or might well have been, done. However, Mr. Hale's book is one to be taken seriously; whether it is read as merely a collection of trials or in the light of its theme, it is an intensely interesting and readable book.

Henry Palmer.

*The Trouble with Cops.* By Albert Deutsch. London: Arco Publishers, Ltd. 1955. xii and 233 and (index) 7 pp. (16s. net.)

The subtitle of this book is " The Truth about the Police in American Cities," and it exactly describes its contents. It confirms the impression gathered from the press and from films that in many parts of the United States the police system is far from satisfactory. At the same time it is clear that there are many efficient police forces. The author shows that the citizens of the United States get the police they deserve and that apathy and indifference are the root cause of bad law enforcement.

Mr. Deutsch's book will appeal to all police officers, and many other readers, with a less professional background, will find it of interest.

M. W. M.

*The River Police.* By Tom Fallon. London: Frederick Muller, Ltd. 1956. 263 pp. (16s. net.)

In this book the author traces the history and development of the Thames Division from 1798 to the present day. The conditions which led to its formation are graphically depicted, and the first half of the book is of great interest. The second half, which is concerned with present day conditions, is perhaps less absorbing and is not helped by a somewhat pedestrian style. Nevertheless, the book is recommended and those who have read *Nick of the River* (reviewed at [1956] Crim. L.R. 366) in particular will find it well worth reading.

M. W. M.

*Viper.* The confessions of a drug addict. By Raymond Thorp. London: Robert Hale, Ltd. 1956. 192 pp. (12s. 6d. net.)

The subtitle of this book sufficiently explains its content. It is not attractively written but fortunately does not indulge in self pity or excuses. One interesting and rather startling fact is that under the National Health scheme it is possible for an addict to acquire, at 1s. a time, enough of his own brand of poison to satisfy himself and several friends.

E. A.

**Books Received:**

*Tales of the Criminous.* A selection from the works of William Roughead made and edited by W. N. Roughead. London: Cassell & Co., Ltd. 1956. xii and 266 pp. (18s. net.)

*Clarke Hall and Morrison's Law Relating to Children and Young Persons.* Fifth edition. By A. C. L. Morrison, C.B.E. and L. G. Banwell. London: Butterworth & Co. (Publishers), Ltd. 1956. xl and 703 and (index) 36 pp. (90s. net.)

*Crime and the Penal System.* A textbook of criminology. By Howard Jones, B.SC.(ECON.), PH.D. London: University Tutorial Press, Ltd. 1956. 262 and (index) 7 pp. (16s. net.)

*Current Legal Problems, 1956.* Edited by George W. Keeton and Georg Schwarzenberger. London: Stevens & Sons, Ltd. 1956. vii and 265 and (tables and index) 10 pp. (32s. 6d. net.)

*Nine Verdicts on Violence.* By Jack Smith-Hughes, Barrister-at-Law. London: Cassell & Co., Ltd. 1956. xi and 219 pp. (18s. net.)

## Reader's Digest:

*Trial*: The presumption of innocence is briefly treated at 222 *Law Times* 60.

*Magistrates' courts*: Is consent to summary trial always irrevocable? 120 *Justice of the Peace* 500.

*Magistrates' courts*: Where a defendant is charged with more than one offence based on the same facts and the principle that " no one ought to be punished twice for the same offence " may apply, it is urged that the cases should be heard separately: 120 *Justice of the Peace* 533.

*Police*: How much law a policeman should learn and how he should be taught it are points considered in the first of a series of five articles in the *Police Review*, August 31, 1956, at p. 622.

*Police*: Cases concerning assaulting, resisting and obstructing the police are examined at 20 *Journal of Criminal Law* 289.

*Children and young persons*: Gangs and delinquent groups in London are considered by Dr. Peter Scott: 7 *British Journal of Delinquency* 4.

*London*: Crime in London river is the subject of an article at 106 *Law Journal* 531. And see p. 680, above.

*Statistics*: The criminal statistics of England and Wales are compared with those of Scotland: 7 *British Journal of Delinquency* 50.

*Forensic Science*: An address by Mr. L. C. Nicholls, Director of the Metropolitan Police Laboratory, on modern trends in forensic science is published in the *Police Review*, August 17, at p. 588.

THE
CRIMINAL LAW
REVIEW

*Editors*
JOHN BURKE and PETER ALLSOP, M.A.
*Barristers-at-Law*

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# Editorial

## Shoplifting

The affair of Nina and the five hats reached what may almost be described as a happy ending at Marlborough Street on October 12 when the defendant was found guilty but given an absolute discharge on payment of three guineas costs. The constitutional issues raised when Mme. Ponomareva at first failed to surrender to her bail are examined in an article at p. 725.

Shoplifting in London has increased in recent years, and as the Report of the Commissioner of Police of the Metropolis for 1955 remarks " it is interesting to note that the total for 1955 was over 90 per cent. higher than that for 1938 when there was more unemployment and the purchasing power of the community was less evenly spread than it is now." In 1955 in the 3,160 cases reported to the police property to the value of £7,800 was involved, of which three-quarters was recovered. Nearly 60 per cent. of the articles stolen by shoplifting consisted of food and clothing.

This offence is peculiar in that it is often exceedingly difficult to discover the motive for its committal. Miss Lesley Storm's play " Black Chiffon," broadcast in 1955, is of interest on this point.

Sentences for shoplifting were considered by the Lord Chief Justice in an address to the annual meeting of the Magistrates' Association on October 18. Lord Goddard confessed surprise at how often shoplifters get off with fines instead of imprisonment and at how frequently quarter sessions have interfered with sentences of imprisonment imposed by magistrates for this offence. He pointed out that there is no doubt that where a particular kind of crime is prevalent sharp sentences do have a very marked effect upon it, and cited as examples the sentences imposed for post office frauds and lead stealing.

### Disqualification from driving

In an address to Lancashire justices and their clerks in September the Lord Chancellor suggested that magistrates when dealing with traffic offences do not use their power to disqualify from driving as often as they might. Referring to the increasing number of road casualties he suggested that " these figures should bring home to us the fact that the motorist is in control of a lethal instrument, and should lead magistrates to consider very carefully whether the penalties which they are in the practice of imposing on motorists who handle that instrument in a way which endangers other people are sufficient to impress on the motorist the seriousness of his offence." He continued: " In particular, I would remind you that you have a wide discretionary power to disqualify in cases where the statute itself does not make disqualification automatic. It has been suggested from time to time in debates both in the House of Lords and in the House of Commons, that this is a power which magistrates might usefully employ more frequently, since it is disqualification which the motorist fears rather than a fine. Disqualification serves a double purpose in that it is firstly the punishment most feared by the motorist and therefore the most effective deterrent, and, secondly, it keeps a careless or dangerous driver off the roads for a period and does that practical amount of good." [1]

### Departmental Committee on law relating to children

The Home Office has announced the names of the Departmental Committee which is to inquire into the law relating to children and young persons (see [1956] Crim.L.R. 514). As was previously announced the Rt. Hon. Viscount Ingleby is the chairman and the other members are Lady Adrian, a member of the Cambridge Juvenile Court panel and probation committee; Mrs. P. L. Aitken, a governor of the Thomas Coram Foundation for Children; Mr. R. H. Blundell, Metropolitan Stipendiary Magistrate; Dr. D. Carroll, psychiatrist, a member of the Home Office advisory council on treatment of offenders; Mr. Donald Ford, a member of the L.C.C. and the London Juvenile Court panel; Mr. E. H. Gwynn, assistant under-secretary at the children's department of the Home Office; Dr. R. M. Jackson, Reader in Public Law and Administration, Cambridge University; Mrs. M. M. C. Kemball, a member of Lancashire County Council and of the Home Office advisory council on child care; Professor Alan Moncrieff, Nuffield Professor of Child Health, University of London; Mr. A. Pickard, town clerk of Bristol; Lady Ridley, a member of Northumberland Children's Committee; Mr. G. A. Wheatley, clerk of Hampshire County Council; Alderman D. T. Williams, Lord Mayor of Cardiff; and Mr. J. P. Wilson, clerk to the Sunderland justices.

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[1] See *The Times*, September 25, 1956.

Mr. T. H. East of the Home Office is the secretary of the committee and those wishing to submit evidence should communicate with him at Horseferry House, Thorney Street, London, S.W.1.

## Police methods

In an effort to trace a man who is believed to have murdered Mrs. Diana Suttey and taken her body to a country lane, the police commissioned an artist to draw a portrait of the man and published it in the *Police Gazette*. The artist worked from details provided by several people who saw the man on the day of the murder. The issue of a portrait of the suspect in this manner is a fairly common practice in the United States. In an article in the *International Criminal Police Review,* in April this year, M. Chabot, head of the Regional Criminal Police, Lille, France, described how he has used composite photographs for identification purposes.

## Forensic science laboratory

Premises recently opened in Belfast for the Department of Industrial and Forensic Science provide facilities for the scientific investigation of crime in Northern Ireland on a similar scale to those existing in England and Wales. Previously such investigations in Northern Ireland were referred to the North-Western Forensic Science Laboratory at Preston.

## A Russian prison

Anyone who is interested can gain a fairly clear picture of life in an English prison by reading one of the number of books recently published on the subject or by following parliamentary debates. It is interesting to compare life in a Soviet prison, Butyrka, as described in a recent Russian article, referred to in

*The Times* of September 14. The prisoners work an eight-hour day (six hours on Saturday) in the prison machine and carpentry shops, laundry and other shops serving the prisoners. Each prisoner has a norm set for his work, and on its fulfilment gains a rebate of two or three days of his term for each day of work. He is paid and may spend up to 100 roubles (nominally £9) in the prison canteen each month. Each prisoner is permitted to receive three 6 lb. food parcels a month and fresh fruit and vegetables in unlimited quantities.

Unfortunately there is no indication as to whether, and if so how, the Soviet authorities have solved the problems facing prison administrators in this country, such as overcrowding and lack of staff. The article does say, however, that no new prisons are being built because crime in the U.S.S.R. is diminishing from year to year.

### The Howard League for Penal Reform

The Howard League for Penal Reform has issued its annual report for the year ending on June 30, 1956. In it a number of proposals are made for the reform of local prisons. It is suggested that the number of prisoners should be reduced by using alternative methods of dealing with many offenders who now receive short sentences and the segregation and treatment of abnormal prisoners in a special institution. The larger local prisons should be split up into smaller units and governors freed from some of their administrative duties. Prison officers' duties should be extended to include rehabilitative work with individual prisoners.

The League's committee is concerned about the usefulness of detention centres, particularly as six further centres are planned. They believe that the selection of boys to go to such centres has been haphazard and that unsuitable boys have been sent. They urge caution until more is known about results at the centres already existing.

### Judicial appointments

Mr. Christmas Humphreys has been appointed Recorder of Guildford and Mr. H. W. M. Coley, Recorder of the Borough of Burton-on-Trent.

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# Nina Ponomareva

The case of Nina Ponomareva provides a useful opportunity for removing some popular misconceptions about relations between the Government, the Attorney-General and the courts. Mme. Ponomareva, it will be recalled, was charged by a private prosecutor with larceny; she failed to appear to answer the charge and a warrant for her arrest was issued under section 97 of the Magistrates' Courts Act, 1952; a few days afterwards the prosecution was, at the request of the private prosecutor, taken over by the Director of Public Prosecutions.[1-2]

It was popularly assumed both that the Government was anxious that the proceedings should be stopped and that if any action to stop them were feasible it would be taken by the Attorney-General as the Minister responsible for the acts of the Director of Public Prosecutions.[3] The truth of the matter is, of course, that summary proceedings cannot be stopped without the leave of the court and that in exercising his powers in relation to the conduct of prosecutions the Attorney-General (and, *a fortiori,* the Director of Public Prosecutions) is in no sense an agent of the Government of the day. Accordingly the Government as such has no power to intervene in criminal proceedings and any anxiety that they should be stopped would not, and constitutionally could not, be reflected in any executive decision short of the introduction of a Bill of Indemnity.[4]

### *Terminating the proceedings*

The question of the warrant can be quickly disposed of. By virtue of section 102 (1) of the Magistrates' Courts Act, 1952, a warrant of arrest remains in force until it is executed or withdrawn and, subject to the power of the High Court to order its withdrawal by mandamus,[5] it can be withdrawn only by the court which issued it.[6]

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[1-2] By virtue of regulation 1 (*c*) of the Prosecution of Offences Regulations, 1946 (S.R. & O. 1946, No. 1467), which provides that "it shall be the duty of the Director of Public Prosecutions to institute, undertake or carry on criminal proceedings . . . in any case which appears to him to be of importance or difficulty or which for any other reason requires his intervention."

[3] Prosecution of Offences Act, 1879, s. 2. There is no foundation for the suggestion, which appeared in a periodical whose editor should have known better, that the Director, as an official, receives instructions from the Cabinet in the exercise of his functions.

[4] The practice of granting a pardon before conviction (as to which, see *R.* v. *Boyes* (1861) 1 B. & S. 311) has fallen into disuse.

[5] *R.* v. *Crossman, ex p. Chetwynd* (1908) 72 J.P. 250.

[6] *R.* v. *Ross, ex p. Amalgamated Engineering Union* (1943) 107 J.P.N. 88.

The questions raised by the suggestion that the charges should be dropped are, though more numerous, no more complex. Mme. Ponomareva was charged with larceny, and she could not therefore be tried summarily unless it appeared to the court, having regard to any representations made by her or by the prosecution in her presence, that the circumstances did not call for trial on indictment.[7] Evidence given before examining justices must be given in the presence of the accused.[8] The court could not therefore even begin to hear the charge against her in her absence and, until she appeared, no question of the prosecution offering no evidence could arise. In her absence, therefore, the proceedings could be stopped only if the court allowed the charges against her to be withdrawn.

It remains, under this heading, to dispose of the suggestion put forward by one newspaper that the Attorney-General has power to terminate proceedings in a court of summary jurisdiction by entering a *nolle prosequi*. A *nolle prosequi* can be entered only after a Bill of Indictment has been signed[9] and the reference in some authorities[10] to proceedings on information being stayed in this manner is, of course, to proceedings commenced by information in the Queen's Bench Division.

### *The Attorney-General*

It was, therefore, open to the prosecution to apply to the magistrate for the withdrawal of the warrant or the charges or both of them[10a] and, once the prosecution had been taken over by the Director of Public Prosecutions, this meant in practice that the Attorney-General had to decide whether any such applications should be made.[11] As is now known, he decided that they should not; and it was announced at the same time[12] that, on the information then available, he had decided that, if Mme. Ponomareva appeared to answer the charges that had been preferred against her, the prosecution would not adopt the course of offering no evidence.

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[7] Magistrates' Courts Act, 1952, s. 19 (1). After the prosecution had been taken over by the Director of Public Prosecutions the charges could not be tried summarily without his consent: s. 19 (7) (*b*).

[8] Magistrates' Courts Act, 1952, s. 4 (3).

[9] Halsbury's *Laws of England*, 3rd ed., vol. 10, p. 398; *R.* v. *County of London Quarter Sessions Chairman, ex p. Downes* [1954] 1 Q.B. 1 at 6.

[10] *e.g.*, Halsbury's *Laws of England*, 3rd ed., vol. 7, p. 383; Archbold's *Criminal Pleading, Evidence and Practice*, 33rd ed., p. 110.

[10a] The application for the withdrawal of the charges on the other hand could, of course, have been made only by the prosecution. As the warrant was issued under section 97 of the Magistrates' Courts Act, 1952, anyone could have applied for its withdrawal.

[11] It is to be observed that, if the private prosecutor had been allowed to withdraw the charges, a report would have been sent to the Director of Public Prosecutions by the clerk of the court: Prosecution of Offences Regulations, 1946, reg. 9.

[12] At a press conference at the Foreign Office on September 27.

The Attorney-General is, of course, a Minister of the Crown, but he has many functions which he exercises in an independent capacity [13]: in other words, the decisions he makes in the exercise of these functions are his own decisions, not those of the Government of which he is a member. His functions in relation to prosecutions are of this kind. They derive from the fact that, as a general rule, anyone may institute a prosecution: the Attorney-General's function is, on the one hand, to ensure that where the public interest requires a prosecution a case does not fail for want of a prosecutor and, on the other, to prevent the institution of vexatious proceedings. It is now well established that, while he may—and sometimes should—consult his ministerial colleagues about the effect of his decisions in relation to prosecutions, he does not ask them what his decisions ought to be and there is, therefore, no question of his taking anything in the nature of orders from them, either collectively or individually. It is, for example, reasonable to assume that the Attorney-General consulted, and took into account the advice of, the Foreign Secretary about the effect on our relations with the Soviet Union of a decision to make, or not to make, an application to the magistrate for the withdrawal of the charges against Mme. Ponomareva. It would be a gross mistake to suppose that he asked the Foreign Secretary to advise him whether or not the application should be made.

The modern practice may be said to have been firmly established by the notorious *Campbell* case,[14] which was the immediate cause of the fall of the first Labour Government. In that case the Director of Public Prosecutions, acting on the instructions of the Attorney-General, applied to the magistrate for leave to withdraw a charge which had been preferred under the Incitement to Mutiny Act, 1797, against the acting editor of the *Workers' Weekly*. The impression arose that the application was made on political grounds at the instigation of the Prime Minister, if not on the instructions of the Cabinet; neither the Prime Minister nor the Attorney-General was able to dispel that impression and the House of Commons carried a vote of censure against the Government. The case not only established the modern practice but made it clear that the previous practice was very different and, in particular, that the Attorney-General's most trenchant critic, Lord Birkenhead, had himself in the not so distant past been guilty of the very sin which he now denounced.[15]

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[13] As to which, see *R.* v. *Comptroller-General of Patents, ex p. Tomlinson* [1899] 1 Q.B. 909.

[14] There is an account, both succinct and accurate, in the *Autobiography* of Sir Patrick Hastings (1948) at pp. 237-247. For a fuller version, see 177 H.C.Deb. 581-703.

The modern approach to the constitutional position of the Attorney-General was set out on January 29, 1951, by Sir Hartley Shawcross, who then held the office, in what was obviously a carefully prepared statement.[16] Sir Hartley was dealing with two criticisms of the way he had exercised his powers in relation to the prosecution of the leaders of unofficial strikes: the first, that " the operation of the law is automatic . . . where the offence is known "[17]; and the second, that he had allowed his political allegiance to influence him in deciding whether such prosecutions were in the public interest. The crux of his reply lies in two passages—

> " My hon. and learned Friend then asked me how I direct myself in deciding whether or not to prosecute in a particular case. That is a very wide subject indeed, but there is only one consideration which is altogether excluded, and that is the repercussion of a given decision upon my personal or my party's or the Government's political fortunes; that is a consideration which never enters into account. Apart from that, the Attorney-General may have to have regard to a variety of considerations, all of them leading to the final question—would

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[15] 177 H.C.Deb. 581 *et seq.*, particularly cols. 598–599 and 614–615, and, for Lord Birkenhead's criticism, *The Times*, October 2, 1924, and October 8, 1924. No confirmation has ever been provided of Lord Birkenhead's account of his refusal to consider an application for his consent to prosecution until after the excision of a Cabinet minute instructing him to grant it; nor, it may be surmised, is it now likely that his account will ever be confirmed.

It seems that Lord Hewart, while Attorney-General, was prepared to accept instructions from his colleagues: 177 H.C.Deb. 598–599, and see Jennings, *Cabinet Government*, 2nd ed., pp. 217–218. As recently as 1950, Wade and Phillips on *Constitutional Law* contained a statement (omitted from the latest, *i.e.*, 5th edition) that " the institution of a prosecution for certain offences, *e.g.*, sedition may involve considerations of policy as well as law. In such cases the decision may be taken by the Home Secretary, or even the Cabinet, with the advice of the Attorney-General, as chief law officer of the Crown," but no authority was quoted in support of it and it does not appear that, after the *Campbell* case, it can be justified.

[16] 483 H.C.Deb. 681–688.

[17] In a leading article in *The Daily Telegraph* for October 7, 1950. Lord (then Sir John) Simon referred to this proposition in a debate on the prosecution of some Communists in 1925: 188 H.C.Deb. 2105. His language deserves quotation: " There is no greater nonsense talked about the Attorney-General's duty than the suggestion that in all cases the Attorney-General ought to decide to prosecute merely because he thinks there is what the lawyers call ' a case.' It is not true, and no one who has held that office supposes it is."

> a prosecution be in the public interest, including in that phrase of course, in the interests of justice? [18] . . .
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> "In order so to inform himself, he may, although I do not think he is obliged to, consult with any of his colleagues in the Government; and indeed, as Lord Simon once said, he would in some cases be a fool if he did not. On the other hand, the assistance of his colleagues is confined to informing him of particular considerations which might affect his own decision, and does not consist, and must not consist, in telling him what that decision ought to be. The responsibility for the eventual decision rests with the Attorney-General and he is not to be put, and is not put, under pressure by his colleagues in the matter." [19]

In the present context it seems to be necessary to add only two observations to those words: the first is the truism that, once the proceedings have begun, the ultimate decision whether they shall continue lies not in the Attorney-General's hands but in the court's [20]; the second is that, as Lord Simon pointed out during the debate on the *Campbell* case, "it is one thing to say 'I will not institute another prosecution,' and it is quite another thing to say 'Having instituted it, I will drop it without conditions'." [21] It may well be, in other words—and this is of course mere speculation—that if the Attorney-General had been consulted about the proposal to institute proceedings against Mme. Ponomareva he would have instructed the Director of Public Prosecutions not to take any action against her.[22] It does not, however, follow from that hypothesis—and this is perhaps the most important lesson to be learned from the affair—that, the proceedings having been instituted without reference to him, it thereupon became his duty to drop them.

### *The court*

It is, as events have proved, unnecessary to speculate how the court would have regarded an application for leave to withdraw the charge. There can be no doubt, however, that the magistrate would have required reasons to be given in support of the application [23]; and there can, it is suggested, be equally little doubt that, if the reasons had been of the kind which the popular press has put forward as both appropriate and adequate, the court's reaction would have followed the lines, if not perhaps the majestic language, of the judgment of Lord Mansfield in the case of *R.* v. *Wilkes* (1770) 4 Burr. 2527 at 2561, of which it is probably sufficient to cite only the words: " The constitution does not allow reasons of State to influence our judgments: God forbid it should! "

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[18] 483 H.C.Deb. 682.

[19] 483 H.C.Deb. 683–684.

[20] Subject, of course, to the Attorney-General's right to enter a *nolle prosequi* in proceedings on indictment.

[21] 177 H.C.Deb. 625.

[22] Such a decision would not, of course, have debarred a private prosecutor from instituting proceedings.

[23] Reasons were given to the magistrate in the *Campbell* case. The public concern about the withdrawal of the charge was due at least in part to

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the unhappy (and not very apt) reference by Treasury counsel (later Humphreys J.), in making the formal application, to " representations " having been made to the Attorney-General. It was widely, but erroneously, thought that the Prime Minister had made them.

# *The Davenport Case*

By J. W. C. TURNER

(*Continued from* p. 673)

In what may for convenience be called the *Taylor* v. *Plumer* line of cases the situation was always one in which a trust arose and the question was as to the right of the principal to sue at common law on a quasi-contractual basis for money had and received " to his use," the rule being accepted that the action would only be available where the property into which his original property had been changed could be distinguished; the action was in all cases an action *in personam* to enforce a right *in personam.*

Now although it may perhaps be permissible to say that a man " owns " his rights *in personam* and so to speak of the principal as " lawful proprietor," or of the debt as " belonging to " the principal, it must yet be remembered that this is quite different from owning the material bank notes or cash which his right entitles him to claim to have transferred to him by the agent who is his debtor.

It is, however, solely with the tangible objects, the material substance, the coins or bank notes, that the felony of larceny or of embezzlement has to do. There can be no larceny or embezzlement of a chose in action such as a debt or a copyright.[13] If a man takes my cheque dishonestly it is only the piece of paper which he steals [14] (which does, of course, have *some* value) and it is therefore immaterial whether the cheque constitutes an order on the banker to pay one penny or to pay a thousand pounds; or, indeed, whether or not the cheque can or will be met. *Taylor* v. *Plumer* and the cases associated therewith have no proper connection with criminal law. In criminal law there is no question of there being any principles of equity to take into account or to follow, especially *against* the accused person. It is therefore emphasised once more that such expressions as " his property " and " belonging to " the principal in the cases discussed above have no bearing on the points of criminal law in the offences of embezzlement or larceny. Failure to appreciate this leads to misunderstanding of the effect of such a case as *Wilson and Meeson* v. *Pickering* [1946] 1 All E.R. 394. This was a successful appeal on a claim in the alternative for conversion or [15] for money had and received (*per* Lord Greene M.R. at p. 395, letter D). The respondent had relied upon estoppel and the Court of Appeal held that estoppel did not arise in her favour. A servant of the plaintiff firm W. & M. had forged their signed cheque form (crossed and " not negotiable ") by filling in falsely (a) the amount, and (b) the name as payee of her own creditor Pickering to whom she owed that amount. P. paid in the cheque to her own bank account and then drew out the said amount which was £54 4s. 0d. It is obvious that W. & M. were owners of the cheque form which their servant stole, forged, and uttered, just as Davenport's masters were owners of the forms which he stole, forged, and uttered. But the report contains no word whatever to the effect that W. & M. could trace their cheque form into the cash drawn by P. as " belonging to " themselves; there could be no question of tracing, for the money was owned by P. being drawn from her own bank on her own cheques, and further, it was not distinguishable. The case was decided solely on the points (a) that P. had not received a negotiable instrument (nor, indeed, had she given value for it) and therefore had no better right in regard to it and its legal effect than had the dishonest person who transferred it to her; and (b) that W. & M. were not estopped *as against her* [16] from setting up the forgery. Their action was *in personam*, a quasi-contractual claim for money had and received to their use grounded on an unjust enrichment at their expense. *Taylor* v. *Plumer* had no bearing on this case, nor has this case any bearing on Davenport's case beyond the fact that the thief and forger Peate in this case and the thief and forger Davenport were not performing their duties as servants when they were effecting their crimes. For the above reasons it is submitted that the theory which includes ownership of the property by the master as an essential element of embezzlement cannot be substantiated by the decided cases which have been invoked in its support.

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[13] For the same reason a man cannot commit larceny or embezzlement of a balance of accounts: for a balance is merely a mathematical calculation of the difference between two columns of figures entered in the two sides of the account. For larceny the prosecution must prove that the prisoner took and carried away the actual coins or notes whose nominal value is what the balance has been calculated to be. This is often difficult to prove, and it was largely for this reason that the crime of falsification of accounts was created by Lopes' Act, 1875.

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[14] *R.* v. *Perry* (1845) 1 Den. 69.

[15] Not " and " as stated in 19 *Modern Law Review* 43.

[16] As they were, presumably, estopped from denying their own bank's right to debit their account (on the principle of such cases as *London J. S. Bank* v. *Macmillan* [1918] A.C. 777).

But someone may perhaps object that even if any doctrine requiring the ownership of the property has to be abandoned yet the following proposition should be accepted, namely:

> No matter what the duties of a man's service to his master may be contractually expressed to be, the mere fact that a chattel or cash has come into his possession (provided it has not also come into his ownership) in circumstances such that the master has a right to sue him by an action on a quasi-contract for its value, invests him automatically with a primary duty of service to hand over the identical object into the possession of the master; so that, if he does not hand it over, but retains it or converts it for his own purposes, he commits the crime of embezzlement.

A little thought will, however, detect that there is a fallacy in this argument. We have seen [17] that the words of the statutory definitions of embezzlement have from the beginning been interpreted as requiring that the servant must have been engaged in performing his service duties when taking or receiving the property into his possession and that the omission of the words " by virtue of his employment " from the Act of 1861 onwards have done no more [18] than remove any doubt there might have been in the case where a servant has voluntarily enlarged the scope of his contractual duties in any particular case by accepting possession of property on behalf of his master which he could have refused, without committing any breach of his contract of service. In short, a man is only a servant in respect of the contractual duties of service which he has undertaken. A servant who in breach of his duty as such, fails to transfer a specific object into his master's possession exposes himself in many cases to a civil action by his master claiming the value of the object—but this liability is a consequence of his breach of service duty, and is not the cause of that duty. What has to be regarded is the reason why the one man is under a legal obligation to transfer the object to the other man. Thus if D has no contract of service at all with E the mere fact that D has a legal duty to transmit property to E will not create the relation of master and servant between the two.[19] By the same reasoning, if a man is engaged in some activity which falls outside the duties which he has contracted to perform as servant for a master, then he is not, in that activity, a servant; and as in the case above, the fact that he may be liable civilly to pay the value of property which he has acquired will not make him a servant in the activity by which he acquired the property. Take another supposititious case; a servant X is not performing any *duties* of service to his master Y when he collects his wages. If Y, his master, by mistake overpays X then (a), the servant X is under a legal obligation to restore the excess to his master: but this obligation is not an obligation to perform a contractual duty of service, but a quasi-contractual obligation derived from the unjust enrichment which he has received, on which his master could sue for money had and received. Of course there could be no question here of embezzlement of the excess cash because the money came from the master to the servant. But let us suppose (b), that Y had contracted with A to carry out certain repairs at A's house and sent X to the house to do the job: X stayed late to finish the work and for some reason then found that he would arrive back at his master's office too late to collect his wages from Y, and explained his predicament to A who said he would pay his wages and deduct the amount from the cheque which he was about to write out and send to Y in settlement of the contract price for the job, which he did. A then telephoned to Y, explained the position, and stated the sum which he had paid to X, and Y ratified his action. It was subsequently found that A had miscalculated the sum due to X and had paid him £1 too much and had, therefore, made out the cheque to Y for £1 less than the amount should have been. It would seem that in this situation X is liable to Y under quasi-contract for money had and received as in the former case; but here the reason why he would not be guilty of embezzlement, if in some way he behaved dishonestly in the matter, would be because in collecing his wages from A he was not performing an act of service to Y.

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[17] *Ante*, p. 591.

[18] Whatever the legislature may have expected to be the result of the omission. To take one example: it would not have produced a different result if the facts of *R.* v. *Harris* had been repeated, as *R.* v. *Cullum* shows.

It follows therefore that the conviction of Davenport for embezzlement cannot be supported by the argument that Davenport might have been liable to be sued by his masters for money had and received.[20]

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[19] *Cf. R.* v. *Negus* (1873) L.R. 2 C.C.R. 34, where the man employed was under a strict duty to hand over to his employer forthwith all the money which he collected; yet this did not make him a servant, and therefore his conviction of embezzlement was quashed.

### The Judgment of the C.C.A.

Having now completed the review of the arguments which have been advanced in approval of the decision in regard to embezzlement in the *Davenport* case, there remains the question, What in fact does the judgment itself disclose as to the *ratio decidendi*?

The reasons given by the Court of Criminal Appeal for Davenport's conviction that can be extracted from the reports are:

(a) That the money, as it was the proceeds of his master's cheque, was received for and on behalf of his master.[1] This conclusion, however, was reached without any indication that account had been taken of the implications created by the facts which disclosed a forgery; namely, that the documents used by Davenport were fabricated instruments which were *not* his master's cheques but false imitations; and that the money which he fraudulently obtained from Samuel was the proceeds of these false imitations; so that it would not follow that the money must have been received for and on behalf of his master, as was concluded. That the forgery was not taken into account at all is shown by the words " On that part of the case it is only necessary to refer to *Regina* v. *Gale* . . . ", for in *Gale's* case there was no forgery.

We have also submitted above that a man engaged in making imitations of his employer's cheques and feloniously obtaining money thereby from a third party cannot be said to be performing duties of service to his employer.

(b) A further reason given is that the court regarded the facts of the case as identical with the facts of *R.* v. *Gale*.[2] As to this, at the risk of tiresome re-iteration, it must be emphasised that the cheques in *R.* v. *Gale* were complete and valid orders to the banks of the drawers (who were the creditors of Gale's masters) with Gale's name inscribed by them as payee, so that when he endorsed them he did not commit forgery; whereas, as we have stated more than once, the incomplete cheque forms which Davenport appropriated to his own use were not valid orders since they lacked his own signature; and when he added unauthorised amounts and names of payees he forged them, with the results set out in (a) above.

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[20] It is indeed not certain that he could have been sued by that action. But for our present purposes it is not necessary to discuss this point.

[1] At p. 571 in [1954] 1 W.L.R.

[2] At p. 42 in (1954) 38 Cr.App.R. the Lord Chief Justice said " I cannot see any difference between that case and this case. . . . In our opinion that case " [*R.* v. *Gale*] " entirely covers this case so far as the Samuel cheques are concerned."

(c) A third reason is contained in the statement[3] "The jury . . . must . . . have been satisfied that Mr. Samuel did hand this money to the appellant, that the appellant received it as a clerk or servant and applied it to his own use."

As to this it must, with all respect, be submitted: first, that the question whether the man received the money as clerk or servant was not a question for the jury except under a proper direction from the Recorder on the points of law involved; as we have seen, in all the cases discussed above which came before the judges by way of appeal the decision on this question was treated by their Lordships as one for themselves to make; secondly, there is no indication in the reports that a proper direction was given to the jury; indeed, the Lord Chief Justice's well-grounded remarks at the outset of the judgment which he delivered, concerning a "misapprehension with regard to the more or less elementary principles of the laws of banking and larceny," are far from indicative that the direction to the jury was what it should have been; and thirdly, even if the jury had been properly directed their decision, since an important point of law was involved in it, was one which could be, and, indeed, had to be examined by their Lordships, and corrected if it was wrong. As we have contended above their Lordships did not have their attention directed by counsel to a full survey of the decided cases, nor were the points as to forgery and the conclusions to be drawn therefrom brought before their minds. These were serious omissions from the material which the court were entitled to have marshalled before them.

Since therefore anything that could and ought to have been said in defence of Davenport on the charge of embezzlement is far from having been said, it is permissible to regard his conviction as wrong. No matter how many other crimes there may be of which a man could properly be found guilty, it is a miscarriage of justice to convict him of a crime of which he is not guilty. It is a trite saying, but true, that if a judgment and an established principle of law are in conflict it is the judgment which must be jettisoned and not the principle of law. Speaking of the "authorities which are to be found" Best C.J. said[4] "If these are consistent we are bound by them, even although our own minds do not approve the principles on which they rest. There would otherwise be no certain rule which could be known to those who are required to conform to the law. If the decisions are contradictory, we are to consider the reasons given for them by those who pronounced them. . . ." That declaration explains the maxim *stare decisis*, to which Mr. Justice James Parke was alluding [5] when he said "It appears to me to be of great importance to keep this principle of decision steadily in view, not merely for the determination of the particular case, but for the interests of law as a science." It is for these reasons that it is submitted that *R.* v. *Davenport* should not be treated as authoritative in any future prosecution for embezzlement. Since it is human to err, morality demands that mistakes should be acknowledged, and so far as possible put right. As Park J. said to the House of Lords in the above cited case [5] "Before I enter into the argument . . . I hope I may be allowed to assert, that had anything passed, either in the Court of King's Bench, or in this house, which had convinced my understanding that my former opinion was erroneous, I should be one of the first to acknowledge my mistake, and to retract my judgment. I have done so on two occasions in this house, and shall never be ashamed to make such an avowal; for none but a weak, nay a wicked mind, will persist in error, if the understanding and more mature reflection convince a man that he had before formed a wrong judgment."

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[3] At p. 43 of the same report.

[4] *Newton* v. *Cowie* (1827) 4 Bing. 234 at p. 241

Apart from the points on embezzlement there was an *obiter dictum* in *R.* v. *Davenport* which calls for comment, in the light of the principles of law which have been discussed above. In respect of the four cheques mentioned in the first four counts of the indictment which Davenport had forged for the purpose of settling his debts to his own creditors, the Court of Criminal Apppeal held that his conviction of larceny must be quashed. But in the course of the judgment it was said [6] "If the appellant had been charged with the fraudulent conversion of the cheques, there could have been no answer." [7] It is submitted with all respect that this dictum, as it stands, is misleading. The four incomplete cheque forms were in the custody (but not the ownership nor the legal possession) of the servant Davenport. Therefore when he took them for his own dishonest purposes he stole them and brought himself within section 17 (1) (*a*) of the Larceny Act, 1916. Since he did not have legal possession of them he was not a bailee who fraudulently converted them contrary to section 1 of the Act. And since he did not own them he did not fraudulently convert them so as to commit the misdemeanour contrary to section 20 (1) (iv) of the Act. From the time of Coke[8] onward the rule has been that a statute should be a construed *ex visceribus actus*, that is, as though it were one whole sentence.[9] So also it is a rule that, when seeking to discover the true construction of any particular clause of a statute, amongst the points to be regarded is " the connection of the . . . clause with other clauses in the same statute and the conclusions which, on comparison with other clauses, may reasonably and obviously be drawn. . . . If this comparison of [one clause with the rest of the statute] makes a certain proposition clear and undoubted, the Act . . . ought to be so construed as to make it a consistent and harmonious whole."[10] Again, the history of the statutory misdemeanour of fraudulent conversion[11] shows[12] that this relatively modern crime was created, not to give any alternative remedy for crimes already defined, but to fill up a gap in the law through which many dishonest persons were slipping because their misconduct was not larceny by bailee nor larceny by servant. Moreover, of two possible constructions that one should be taken which does not produce absurdity rather than the other which does. Following merely these three canons of interpretation the result is produced that if the facts, as in *Davenport's* case, show that a servant has stolen property committed to his custody by his master, then his case falls within section 17 and not within section 20 (1) (iv) of the Act; that to regard the two sections as alternative would produce absurdity can be shown by posing the following question: Who is to decide whether the man is to be prosecuted for felony under section 17 (maximum punishment fourteen years' imprisonment) or for misdemeanour under section 20 (maximum punishment seven years' imprisonment)? Since a penal statute is to be construed, if not so strictly[13] in modern times as was formerly the rule, at least so far as to give the accused person the benefit of any doubt which may arise upon its construction, then it would seem that the choice should lie with the accused person who would thus in effect be settling his own indictment, a result, which it is suggested, would be an absurd and anomalous one. There may be statutes in which some measure of duplication is inescapable [14] but in our present instance a perfectly simple analysis of the statute shows that such an impasse does not exist.

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[5] *Mirehouse* v. *Rennell* (1833) 1 Cl. & F. 527 at p. 546.

[6] At [1954] 1 W.L.R. 571.

[7] Although the Lord Chief Justice did not expressly say so, it would seem presumable that he intended this dictum to apply also to two cheque forms which Davenport purloined for the purpose of getting money from Samuel.

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[8] 1 Inst. 381b.

[9] *Colquhoun* v. *Brooks* (1889) 14 App.Cas. 493. " It is beyond dispute, too, that we are . . . indeed bound, when construing the terms of any provision found in a statute, to consider any other parts of the Act which throw light upon the intention of the legislature, and which may serve to show that the particular provision ought not to be construed as it would be if considered alone and apart from the rest of the Act "; *per* Lord Herschell at p. 506. See also *Canada Sugar Refining Co.* v. *R.* [1898] A.C. 735, *per* Lord Davey at 741.

[10] *Per* Pollock C.B. in *Att.-Gen.* v. *Sillem* (1863) 2 H. & C. 431 at 515.

[11] " In construing any . . . enactment . . . you must look at the mischief which had to be cured as well as at the cure provided," *per* Lord Lindley M.R. in *Thomas* v. *Lord Clanmorris* [1900] 1 Ch. 718 at 725.

[12] For a brief survey of the history, see Russell on *Crime*, 10th ed., p. 1288, and Kenny, *Outlines of Criminal Law*, 16th ed., pp. 268 *et seq.*

[13] But still bearing in mind the words of Pollock C.B. in *Att.-Gen.* v. *Sillem* (*supra*) " I should say that in a criminal statute you must be quite sure that the offence charged is within the letter of the law."

In conclusion it may be well to observe, that if the propriety of a critical attack upon the dicta and decisions of the Court of Criminal Appeal be queried, the answer is to be found in the words and deeds of that court itself. In *R.* v. *Taylor* [15] the Lord Chief Justice said:

> "This court, however, has to deal with questions involving the liberty of the subject, and if it finds, on reconsideration, that . . . the law has been either misapplied or misunderstood in a decision which it has previously given, and that, on the strength of that decision, an accused person has been sentenced and imprisoned, it is the bounden duty of the court to reconsider the earlier decision. . . ." [16]

In the same spirit, dicta, which on subsequent reflection have been felt to have been erroneous, have both in this court and in the Divisional Court, been retracted and corrected,[17] the judiciary thus maintaining the standard which Park J. so impressively enunciated in *Mirehouse* v. *Rennell*.[18]

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[14] *e.g.*, the Larceny Act, 1861, in which ss. 75 and 76 (*rep.*) were nearly, but not quite identical, a clumsy piece of draftsmanship; but in each section the offence was a misdemeanour and the maximum punishment the same. In some statutes two sections may partially overlap, but on close analysis it is found that each has a special element peculiar to itself; see, *e.g.*, *Goulder* v. *Rook* [1901] 2 K.B. 290 at p. 296.

[15] [1950] 2 K.B. 368.

[16] See also *R.* v. *Newland and Others* (1953) 37 Cr.App.R. 154, where at 167 Lord Goddard C.J. said "It may be that *Manley's* case" ([1933] 1 K.B. 529) "will some day be considered by the House of Lords. . . . We need not further enlarge upon it . . . except to say that in our considered opinion the safe course is no longer to follow it"; and *Plunkett* v. *Alker* [1954] 1 Q.B. 420 at 425, 426, "In *Stansell's Case* (1935) 154 L.T. 241 . . . this court, of which I was a member, held that the justices came to a right decision. . . . It is said that *Stansell's* case is binding on us and that we must give effect to it. . . . I say at once that having further considered that case, I feel great doubt whether the decision was right. . . . I have great doubt whether *London County Council* v. *Stansell* was rightly decided."

[17] *e.g.*, *R.* v. *Dent* [1955] 3 W.L.R. 297 at 298 "in *R.* v. *Jones* (1948) 33 Cr.App.R. 11 . . . dicta of mine as to the case being one of larceny by a trick . . . were clearly wrong . . ."; *Schofield* v. *Jones* [1955] 3 All E.R. 337 at 339, "The passage I have read from the judgment of Humphreys J." (in *Jones* v. *Cockcroft* [1945] 2 All E.R. 333)—"is only a dictum, and I cannot agree with it. . . . I say quite frankly I do not agree with that dictum."

[18] *Supra.*

# Summons and Charge Headings Under the Road Traffic Act, 1956

One of the basic principles governing procedure in the magistrates' courts is that it should be simple and easily understood. In furtherance of this, rule 77 of the Magistrates' Courts Rules, 1952, lays down that a summons " shall be sufficient if it describes the specific offence with which the accused is charged, or of which he is convicted, in ordinary language avoiding as far as possible the use of technical terms and without necessarily stating all the elements of the offence, and gives such particulars as may be necessary for giving reasonable information of the nature of the charge." The summons must, however, state the relevant statutory provision.

Whilst we would not attempt to formalise summonses before the magistrates' court, it may be of value for readers to have available some examples of suitable headings for summonses under the new Road Traffic Act. These drafts are also suitable for use in the case of charges.

The following six summons headings are designed to describe the specific offence charged and therefore we have not included the usual commencement which is set out in Form 2 in the Schedule to the Magistrates' Courts (Forms) Rules, 1952. All the offences dealt with in these summonses are contained in sections which came into operation on November 1, 1956.

*Offences by cyclists*

1. Did ride a bicycle [*or* tricycle], not being a motor vehicle, on a road recklessly [*or* at a speed *or* in a manner which was dangerous to the public] contrary to section 11 (1) of the Road Traffic Act, 1930, as applied by section 11 (1) of the Road Traffic Act, 1956.

2. Did ride a bicycle [*or* tricycle], not being a motor vehicle, on a road without due care and attention [*or* without reasonable consideration for other persons using the road] contrary to section 12 (1) of the Road Traffic Act, 1930, as applied by section 11 (1) of the Road Traffic Act, 1956.

3. Did ride a bicycle [*or* tricycle], not being a motor vehicle, on a road [*or* public place] when under the influence of drink or a drug to such an extent as to be incapable of

having proper control of the vehicle contrary to section 15 (1) of the Road Traffic Act, 1930, as applied by section 11 (1) of the Road Traffic Act, 1956.

*Motor trials*

4. Promoted [*or* took part in] a trial between motor vehicles on a footpath [*or* bridleway], such trial not being authorised by the —— Council, contrary to section 12 (1) of the Road Traffic Act, 1956.
5. Did fail to comply with the following condition(s) subject to which the —— Council authorised a trial between motor vehicles on a footpath [*or* bridleway], namely
contrary to section 12 (1) of the Road Traffic Act, 1956.

*Offences by pedestrians*

6. (1) Being a person on foot, did, in contravention of a direction to stop given by a police constable in uniform in the execution of his duty and engaged in the regulation of vehicular traffic on a road, proceed across [*or* along] the carriageway contrary to section 14 (1) of the Road Traffic Act, 1956 [*add if appropriate*, and (2) did fail when required by a police constable to give his name and address contrary to section 14 (2) of the Road Traffic Act, 1956].

# *Prisons in China*

By ROBERT S. W. POLLARD, *Solicitor*

A delegation of lawyers from England, France and Belgium visited China in April, 1956, at the invitation of the Chinese Political Science and Law Association to study the Chinese legal system. It was the first group of Western lawyers to visit the new China. The English party comprised two solicitors and two barristers and we saw all the law courts, penal institutions and other places which we asked to see. It is thought that a brief description of the penal institutions visited may be of some interest to readers of this *Review*.

## Peking

*"Reform through work"*

The first prison visited was Peking No. 1 Prison. This is governed by an intelligent man of thirty-one, was built about forty years ago and is now operated on the guiding penal principle of "Reform through Work." There is a factory in the prison for making stockings and loom cloth and prisoners all work in the factory unless they are sick or too old. There are 1,800 prisoners including 720 women. All the prisoners are serving a sentence imposed by a court after trial. As well as being educated by the factory work they receive elementary instruction and political lectures. Two-thirds of the prisoners had been sentenced for counter-revolutionary offences; most were serving sentences of three to ten years but there were some with fifteen-year sentences and a few there for life. A number had been sentenced to death but had had the sentence suspended for two years to give them an opportunity of reforming through work. The prison governor told us that he only knew of one case where a death sentence which had been suspended was carried out. The punishment was effected by shooting. This was after a further trial for instigating a prison mutiny.

The daily programme was nine hours' work in the factory, two hours' study, one hour's physical recreation and training, eight hours' sleep and the remaining four hours were free for washing, mending clothes, reading and writing. Each criminal has one day a week off when, for instance, he can do his laundry or take part in theatrical performances. There is a theatre where we saw being rehearsed a play on the need for co-operatives. Visits of relations are allowed once a fortnight and, in urgent cases of illness, on application. Letters can be written at any time but there is, of course, a censorship. There is a stall where books, soap, pencils, table-cloths, towels, shoes, etc., can be purchased.

### *Factory work*

The machinery in the factory was very crowded and moving parts were often not guarded. Some members of the party considered that the English Factories Act would have required more precautions to be taken. China has a law on safety in factories but it does not go into the same detail as the English Act. We were assured, however, that there were no accidents. In the dyeing room there was less crowding and the workers had good protective clothing. In one part of the prison there was a table called a Table of Emulation which showed how well prisoners had done in their work. Outside the kitchen there was a table showing its output!

### *Living quarters*

We inspected the living quarters. There were two shifts of prisoners per bed. Each cell contains from eight to fourteen prisoners who sleep in rows on hard boards with a blanket and a good solid cover. We saw up to fourteen prisoners asleep in some cells (seven per side). The cells are reasonably large—about sixteen feet square—and well ventilated with three high windows. Each prisoner has his own mug, toothbrush and soap. There are no punishment cells. The prisoners washed in enamel bowls in a courtyard in the open. There were armed guards outside the prison but none visible inside; an unarmed warder stood at the end of each corridor. No doors were bolted.

### *Rewards and punishments*

This problem is dealt with by a system of appraisement of the work of each prisoner. This is done monthly, seasonally and annually, and a good prisoner may be recommended for a reward by a meeting of prisoners. A reward may be a public announcement of a prisoner's good conduct or it may be a money payment of up to 150 yuan.[1] There may also be remission of sentence by the cancellation of a death sentence or earlier release. Alteration of a sentence can only be effected by the court on the recommendation of the prison authorities. The first punishment is a warning, the second is a black mark to offset any reward, and the third is confinement to cell with no day off, and no work and no reward. This it is said leads to repentance. For serious crimes the prisoner will be brought before the court again for a further sentence. Most prisoners we were told got some reward and only a few were punished. There is no system of payment of prisoners but there are these cash rewards. Families of prisoners are in the same position as the ordinary population and, if they are in need, they can apply for public assistance.

### *After care*

There are no arrangements for after care. After release prisoners have equal rights with ordinary citizens, except in a few cases where a court has ordered them to be deprived of civil rights. They can ask the Ministry of Labour for assistance in getting work. It is noteworthy that on release a number of prisoners ask to stay on in prison to work in the factory. In this prison 200 had stayed on. They live under similar conditions to the prisoners but receive trade union rates of pay for their work.

### *Two political offenders*

We interviewed two prisoners both of whom had been sentenced for political offences. One said he had been a security agent of the Kuomintang who had hidden other agents and spread false rumours for which in 1950 he had received a sentence of fifteen years, but in 1953 two years was taken off his sentence. His job was to check stores. He had received rewards every year, generally every three months varying from ten to 100 yuan. His last payment had been thirty yuan. He had had a medical inspection when he entered prison and once a year since. He told us he had learnt how wrong he had been; he now understood his crime and had learnt a trade. He was studying the Five Year Plan and agricultural reform.

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[1] 6.80 yuan to £1.

The other prisoner we talked to was serving ten years for being a secret agent before "liberation" and collecting intelligence from the liberated areas. He told us that he saw his wife, children, father and members of his family often. He corresponded with them regularly. He had also received a medical inspection on admission and once a year since.

## Nanking

The second prison we visited was in Nanking. In this case the authorities had practically no notice of our visit. They had not expected us to do anything except sight-seeing in Nanking and were surprised when, late one night, we said we wanted to see a prison the following morning. Conditions did not differ notably from the Peking prison. This prison was built in 1905. It had been used by the Japanese and then by the Kuomintang for political prisoners. Since 1949, it was said, it had become a place for reform and punishment. Great efforts are made to identify the prisoner's work with the Five Year Plan and to obtain a steady increase of production. It was said that the production of a group of factory workers had increased from sixteen to thirty shoes per day. There were 1,075 prisoners but some were old or weak and could not work.

Although the Chinese Government is making vast efforts to make the population literate, many Chinese still cannot read or write and the plight of illiterate prisoners appears perhaps to be more pathetic than in fact it is. The prison authorities are making great efforts to educate the prisoners but it cannot all be done at once. The teachers are largely provided from the prison ranks. The prison had a plan to wipe out illiteracy in three years and to raise the education level of all prisoners to that of high primary school level. I recall some thirteen of those prisoners who could not work squatting on the floor in a cell while one prisoner slowly read a newspaper aloud to them. In other cells they were seen sewing.

Women prisoners comprise 10 per cent. of the prisoners and they had women warders. Most prisoners were there for serious crimes. Sixty-two per cent. were counter-revolutionaries, but their number was slowly declining. The crimes of the remainder were described as minor offences! According to the regulations, the prison authorities have to keep the prisoners in custody, pursuant to a court's order, and confined according to sex and health. Medical examination takes places on entry and thereafter once a year.

The daily round was eight and a half hours for sleep, nine and a half hours for work and the remainder for education, food and social activities. For breakfast prisoners had porridge, and rice for other meals with meat once a week. The sick were provided with a special diet and the prisoners of national minorities would each be provided with the special diet required by their religion or customs; in China there are over thirty national minorities. In 1955 1,000 cases of disease were treated but the mortality rate, we were told, was very low. Prisoners can receive visits once a month and there is no limit to letters. The cells were a little smaller than in the Peking jail and with thirteen men in them the overcrowding was worse. Production, it was said, was one side of the prisoner's task, the other side was his political education. The way to reform him was to make him recognise his crimes and guilt and to give him a desire to be honest; to instil political ideas; to give him hope for the future; to give him technical skill.

We saw the bath-house and two large communal baths. In the summer all criminals have a bath each day but in the winter one each week. They have hot water and one lot of water serves twenty of them.

### *Rewards and punishments*

In 1955, seventy prisoners became master printers, shoemakers or bricklayers. Some had invented new machines. There was a system of appraisement and rewards similar to that in Peking. In the winter of 1955/1956, eighty-four prisoners were rewarded, three had their sentences reduced, six were rewarded by previous demerit marks being expunged, seven were punished, and one prisoner was given a further year's sentence after a new trial. The three who had their sentences reduced had been on suspended death sentence and received instead sentences of imprisonment of thirteen, fifteen and fifteen years' respectively. As in Peking there were two kinds of punishment, one a further sentence after a retrial by a court, the other, administrative, by warning, demerit marks, etc. The initiative of criminals, we were told, had increased and those who were punished were reconciled to it. Appraisement in this prison was annual and seasonal. It was carried out first by a prisoner valuing himself, then being valued by his fellow criminal mates and then having the appraisement checked by the prison authorities. The longest sentence of any prisoner then in prison was twenty years. A reward might be due publicity for a prisoner's achievement or a material reward, including cash. The proportion of rewards was very low in comparison with Peking jail. There was no payment to prisoners of wages. Some prisoners here had also asked if they could remain as ordinary workers on the expiration of their sentences but they were not allowed to because there was no room for them. They have to leave and are placed in work by a government agency.

We saw prisoners reading or writing letters in their cells. There was a small library and a large lecture room. The grounds were bright with flowers and green shoots. We were told that there was only one prison for Nanking and there was also a brick and tile camp.

This prison seemed to us more primitive than that in Peking. The principles applied appeared to be the same but the system of rewards was operating very sparsely and not all the prisoners were being put to work.

We questioned one prisoner who was serving a life sentence. He had been a counter-revolutionary agent and was arrested in April, 1951, and sentenced in December, 1952. He had had two rewards including one of thirty yuan and another of some shoes and underwear. The reward had been partly for exposing his collaborators. When arrested, he said, he did not confess but, after investigation, it was so clear that he had committed a crime that he confessed it as a fact. He denounced his collaborators after some education. He had not had a defence counsel. He was semi-illiterate but was learning to read.

### *Women prisoners*

Most of the women criminals were ordinary criminals. We questioned one woman who was serving a sentence of four years for robbery from the person. She had not received any rewards during the year she had been in prison. More than three months had elapsed between her arrest and sentence and she had not had a defence counsel at her trial. She had confessed because she had been caught red-handed at the scene of the crime. She was involved with two others, one of whom got five years. Her age was forty and she said she was learning very slowly.

### A prison camp at Peking

A brick and tile factory is the alternative penal institution to prison. The court decides to which place a prisoner is to be sent. We visited one near Peking. The Peking area tends to be rather dusty in spring owing perhaps to a lack of trees, although this shortage is being quickly overcome. This camp, as it is better termed, was peculiarly dusty and along the rough road to it the cars had to travel 100 yards apart because of the almost impenetrable clouds of dust. There were 2,500 prisoners and 800 officers. Since escape is easier than from prison, only 30 per cent. of the prisoners were political or counter-revolutionary. All were serving sentences of less than fifteen years and mostly less than four years. At the end of a sentence a prisoner can stay on and work for pay if he wants to and some 40 per cent. of those discharged had in fact done this. (This number is not included in the 800 officers.) These voluntary workers are free to leave the camp when they like; they may live where they choose and if they live in the camp they have living quarters separate from the prisoners.

The Ministry of Public Security decides which particular prison or camp a prisoner is to be sent to in accordance with the sentence of the court. There are no women prisoners here.

We questioned a prisoner who had received eighteen months' for assault. It was his first sentence and two months had elapsed between his arrest and trial. Another man we questioned was a volunteer aged twenty-eight. He had received two years' in 1953 for an offence against military discipline while he was a soldier. He earned about 145 points a month which entitled him to from thirty to forty yuan. He had no family. He had not received any remission of his sentence. He assured us he was free to leave if he wanted to, *e.g.*, on marriage.

Conditions in this camp seemed much the same as in prison. The working day for prisoners is nine hours and, for the volunteers, eight hours. Each prisoner receives one and a half hours a day education. Money can be sent in to him by his family or friends. There was a watch tower, a barbed wire fence and some armed guards but escape would not be difficult. In fact there had been no escapes for fifteen months and in any event prisoners are not likely to want to escape very much in view of the difficulty they would have in obtaining work outside. The camp had the same punishment system as the prisons. There were twenty-four prisoners per dormitory measuring, say, forty-two feet by twelve feet, each prisoner having some two feet to himself. Each room was well ventilated. We saw the washhouse with one hot and one cold tank. Each prisoner has a bath once in four days or once a day if engaged on specially dirty work. Large diagrams displayed figures showing the increase in the camp's production and the names of prisoners who were commended. There is a medical examination of each prisoner every three months but the doctor at the first-aid post said he had very little work. This camp is supervised by the Ministry of Public Security but the Procurator-General has the right to intervene at any time. The court was said to take part in the supervision. This is probably effected by periodical inspection of it by judges. We were told that there was no corporal punishment in this or any other penal institution in China. It is also apparently forbidden in school.

### "The home for loafers" in Shanghai

Finally, I should mention what was called the home for loafers in Shanghai, in many ways an admirable place. Before "liberation" in 1949, Shanghai, as the English residents we met there confirmed, was infested with thieves, beggars, pick-pockets and prostitutes. The new Government swept all these social misfits up and put them in homes for education and training. These homes are not penal institutions and the inmates are not sent there pursuant to a court order. All who were there were over eighteen. The home is administered by the Bureau of Civil Affairs and the Bureau of Public Security. We were told that people who had no regular work might be reported by neighbours and visitors would then be sent to report on them. If the report was found to be true, then they would try and persuade the beggar, or whoever he might be, to come into the home. The prospect of regular food and shelter would persuade most of them although a stubborn few, it was said, had to be forced and they would be convinced of the value of the home in the end. Discharge from the home would take place when the inmate knew the error of his former ways and by reaching a new point of view about work had changed his former habits. By then he would have learnt a trade and could live independently. The maximum period of detention was three years but it varied, and might be only one or two years.

This institution was set up in 1951 and had taken in 4,047 loafers, of which 2,600 had been released, and 1,447 were in residence. 750 were waiting for discharge and only remained in the home because they could not be placed in work outside. Some of the 750 had been in the home for more than three years. They are treated like ordinary workers and can, if they have families in Shanghai, go home freely. The loafers in residence receive no wages but are rewarded for good work in money or in kind and, of course, their meals and clothing are provided. The 750 waiting for discharge were paid according to ability, 18 yuan to 70 yuan a month. But we were told that it is planned to pay wages to everyone in future. The number of loafers was said to be decreasing. There were now only two of these institutions in Shanghai, where formerly there had been four, two for work and education and two for education only. There are similar institutions in other large cities. The aim of the home is to turn the loafers into good citizens by educating them and teaching them a trade.

### *Punishments*

We inquired about punishment and were told that the workers are organised in small groups. They help each other by group criticism. This can be followed by a warning and then by bad marks. These methods generally work well. The home has had a few escapes but those who escape are frequently persuaded to return by their families or neighbours. From 1951 to 1953 there were ten escapes every year, in 1954, three and in 1955, none. Some escapers return voluntarily. There is no punishment for escaping. On his return the man would be educated " even more patiently." There were no armed guards to prevent escape. Again, there was no corporal punishment. We were told that, during the first year, there had been some cases of wrongful detention and persons had been detained who should not have been. These cases were cleared up and, since then, there had been a very thorough investigation before anyone was taken in. An inmate is free to go out with leave. If he disputes the propriety of his detention, he can go to the court himself or write a plea to it. But, in fact, there have been no appeals to the court. We were told that there was a representative of the People's Reception Office in the home to whom anyone could state his case and who would help a dissatisfied detainee to take his case to a court. All that seemed clear was that, in fact, no one had ever appealed to the court.

Before " liberation " the building in which the home is now situated was a thieves' kitchen and everyone in the area was afraid of it. Now, the inmates sometimes go out to work. For instance, they do skilled building work and have constructed an open-air theatre. We saw them engaged on various kinds of machine-work or carpentry, such as making medicine chests. We spoke to one inmate aged twenty-one who had been there just over three years. He said he had been let out on leave, at first once every two weeks but now he was allowed out at any time. He was homeless when he came into the home but now he was a skilled carpenter waiting for a job and earning 35 yuan a month. He had been sent into the home by another person but stayed willingly when he arrived. Another man we interviewed had been a thief. He was aged twenty-seven. He had been there two years and ten months, received rewards of 7 yuan nearly every month, and had become a lathe turner. He saw the doctor every three months.

The sleeping quarters were very overcrowded and the directors freely admitted this. But the living quarters were rather better than in prison. They included a gay dining-room, facilities for cards and chess and the provision of novels, among which one noted Theodore Dreiser. The inmates are all taught to read. They have hot showers twice a week in summer and once a week in winter.

### Conclusions

These facts speak for themselves. The principle of reform through work is a very sound one. There is no doubt that these institutions in China do discharge prisoners who have acquired new skills and trades. Living conditions should not be compared with English prisons. They must be compared with conditions in the rest of China, and here the difference is not very great. China is still a land of extreme poverty although it is true that the standard of life is rising every year and it will go on rising. The material conditions in prisons are not notably worse than those outside. People in China probably shun prison as they do in England because it means deprivation of liberty. The crowding in a cell does not differ very greatly from that in the crowded room in which one family lives, and the crowded prison factory shops are not noticeably more crowded than the crowded factory rooms one sees outside.

Are there internment camps in China? Are there forced labour camps where people work who have never been before a court? All we can say is that we saw no signs of any and we do not believe that there are. It would not be true to describe any of the institutions we saw as places of forced labour. In prisons all over the world prisoners work, but in China the dominant purpose of a prisoner's work is to change the prisoner. Although China has a vast population of 600 millions it still has 1 million or more unemployed. Even if forced labour were contemplated, there would be no need for it since so many workers are available.

We report what we saw. We saw courts trying civil and criminal cases and operating fairly, efficiently and with dignity. We saw counter-revolutionaries tried and defended by counsel, one of whom had his death sentence reduced on appeal to eight years' imprisonment and another who, for murder and espionage in 1942, received only three years. We questioned defence counsel, judges of all courts, and law professors, and they talked to us freely in English or through interpreters. Although the home for loafers is clearly an admirable institution, the absence of any right to habeas corpus in connection with it gave us some anxiety. The absence of any provision restricting the period between arrest and trial must necessarily make us critical. The sooner the infliction of suspended death sentences is stopped, the better for the reputation of Chinese law. However, the present government has only been in power for seven years and in this period it has built up a strong central government. Through the efforts of the People's Procurator and the several Ministries concerned with judicial affairs, the State has now a strong legal machine and there is a respect for law. The rights of defendants and prisoners seem to be receiving more attention and, if China is left in peace, this should continue. Chinese prisons, of course, have their faults as governors and other officials were very ready to admit, but there is an atmosphere of hope and an eagerness to help the prisoner to change and a willingness on the part of the criminal to change his personality and outlook on life, which are too often absent from English penal institutions. Conditions in Chinese prisons, of course, reflect the dynamism and surge of the Chinese revolution. The inmates we saw appeared to be treated humanly and kindly. There was, of course, very much that we did not see, but we are satisfied that what we did see represents the treatment of a very large number of prisoners, and it is most encouraging that, so soon after a revolution, China should have such a good legal and penal system. Some of the spirit and general purpose of Chinese prison administration could with advantage be transplanted into English prisons.

# Capital Punishment in Northern Ireland

By J. Ll. J. Edwards

*Reader in Law in The Queen's University, Belfast*

### *Legislative power of Northern Ireland Parliament and public opinion*

When the Royal Commission on Capital Punishment was carrying out its inquiries it collected together a vast amount of invaluable data as to the law and practice not only in the United Kingdom but also in the United States of America and in many of the Commonwealth and Continental countries. Reference to the pages of the Report (Cmd. 8932 of 1953), however, reveals the surprising omission of any statement as to the position in Northern Ireland, whose Parliament has undoubted power to continue or abolish the death penalty in cases of murder irrespective of what the Westminster Parliament may decide. So much is clear from the general provision relating to the legislative powers of the Northern Ireland Parliament contained in the Government of Ireland Act, 1920, s. 4, which section, however, in the course of enumerating certain excepted matters, debars Stormont from making any law relating to treason. Furthermore, although the Northern Ireland (Miscellaneous Provisions) Act, 1945, s. 1, extended the powers of the Stormont Parliament by enabling it to make amendments to the criminal law and criminal procedure of Northern Ireland relating to any offence, including those offences connected with excepted and reserved matters (*viz*., treason, treason felony, coinage offences and offences relating to the postal service), there is an express proviso which precludes the legislature from altering the punishment for any such " excepted or reserved " crimes except to bring it into conformity with English law. In effect, therefore, so far as capital punishment is concerned Northern Ireland must follow England's example in regard to treason but has a free hand in regard to the penalty for murder and those other capital offences which appear to have fallen into desuetude.

Indeed, when the House of Commons recently gave its third reading to Mr. Sidney Silverman's Death Penalty (Abolition) Bill, much conjecture was aroused in the Province as to what attitude its own Parliament would take in view of the renunciation of the death penalty in cases of murder by the rest of the United Kingdom. As it is, with the subsequent rejection of the Bill by the House of Lords the question for the moment remains largely academic. Moreover, no guidance is to be obtained from earlier debates or division figures for the simple fact is that, since its inauguration in 1922, the Northern Ireland legislature has never once discussed the issue of capital punishment. This, however, should not be taken as indicative of public apathy towards a problem which, as in England, arouses equally forceful expressions of opinion on the part of both abolitionists and retentionists. Those who favour abolition, for example, advance the now familiar arguments that the death penalty is ethically indefensible (no cognisance appears to be taken of the contrary view expressed recently in the House of Lords by the Archbishops of Canterbury and

York) and that, in any case, all the evidence collected by the Royal Commission fails to establish the alleged unique deterrent basis of the death penalty. The retentionists, on the other hand, base their opposition to any move to abolish capital punishment in Northern Ireland principally on the ground that conditions in the six counties are totally different from the rest of the United Kingdom. The fact that members of the Royal Ulster Constabulary are constantly armed when on duty is merely regarded as another necessary safeguard against the ever incipient violent outbursts of nationalism, as exemplified in the recent series of armed raids on police and military barracks. This constant threat of armed violence by those imbued with the idea of ending Partition, a step resolutely opposed by the presently constituted Parliament, must be met, so it is argued, by the deterrent of the death penalty.

### *Analysis of murders since 1922*

In this not very hopeful atmosphere emotions rather than statistics are likely to dictate the policy of Stormont in regard to the abolition of the death penalty, but it may be well to examine the incidence of capital punishment in Northern Ireland between the years 1922 to 1955.[1] Altogether 147 murders are known to the police to have been committed in the six counties during this period, of which ninety-seven, or two out of every three murders, may be described as political killings, *i.e.*, murders committed in the course of the riots and civil commotion which racked the Province during such tempestuous years as 1922 and 1935. It is, perhaps, even more significant that over the whole of the period under review only one case is recorded, *R.* v. *Williams and Others* in 1942, in which a verdict of guilty has been returned for what was palpably a case of political murder. It involved the cold-blooded shooting of a R.U.C. constable by a gang of six men, of whom the ring-leader was eventually hanged, another had his sentence commuted to fifteen years' penal servitude and the sentences of the rest were commuted to penal servitude for life. Assuming that the main basis of the unique deterrent force attributed to the death penalty lies more in the example provided by actual hangings rather than in the threat of execution if detected and convicted, it is questionable, having regard to the above figures, whether the existence of the death penalty has influenced to any marked degree the number of political murders committed in Northern Ireland. It will, of course, be recalled that it is this exceptional form of killing which is said to place the Province in a different position from the rest of the United Kingdom.

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[1] For providing me with the material upon which to base this analysis I am indebted to County Inspector J. G. T. Nelson, Head of the Criminal Investigation Department, and to the Statistical Office, of the Royal Ulster Constabulary.

As to the remaining cases of murder, leaving aside the more common motives like jealousy, provocation, quarrels and sexual gratification which are exemplified repeatedly, it is of interest to note that, hitherto, what may be described as " suicide-pact " and " mercy-killing " murders are unknown in Northern Ireland.[2] Furthermore, no conviction has ever been recorded for murder by poisoning, the last instance of such a killing having occurred in 1930 when the accused was acquitted at his third trial, the jury having failed to agree in the two previous trials. The murder of a husband is equally as rare an occurrence, only one case, in 1933, being recorded. Seven cases of killing in the course of a sexual assault and eight killings in the course of armed robbery or robbery with violence are noteworthy for the very high percentage of convictions and executions which have ensued for these, certainly so far as Northern Ireland is concerned, particularly abhorent types of murder. A further thirteen cases involved the killing of a child under one year, it being pertinent to point out that the crime of infanticide was not introduced into Northern Ireland law until the passing of the Infanticide Act (N.I.), 1939, s. 1.

### *Exercise of the Prerogative of mercy*

In a previous article in this series ([1956] Crim.L.R. 474) reference was made to the distinctive feature of Northern Ireland criminal practice concerning the exercise of the Royal Prerogative. Unlike England, where the responsibility for deciding whether to recommend a reprieve in cases of murder rests with the Home Secretary alone, in Northern Ireland such decisions are made by the entire Cabinet, thus preserving in its most prominent fashion the doctrine of collective responsibility. Authority for this divergence from the English practice is contained in the Instructions to the Governor of Northern Ireland issued under the Royal Sign Manual and Signet in December, 1922, pursuant to Letters Patent of the previous year. According to paragraph V of these Instructions the Governor " shall not grant a pardon, reprieve or remission of sentence . . . without first receiving in capital cases the advice of the Executive Committee [the Cabinet] of Northern Ireland, and in other cases the advice of one at least of the Ministers of Northern Ireland." Should the question of a reprieve "directly affect the interests of our Empire or of any country or place beyond the jurisdiction of the Government of Northern Ireland"—a condition which in times of civil commotion and political strife is clearly capable of a wide interpretation—the Governor is required to take these interests "specially into his own personal consideration" in conjunction with the advice tendered by the Cabinet. It would appear, therefore, that when these instructions were being formulated in 1922 circumstances were envisaged in which the Governor would be impelled to act contrary to ministerial advice, and there is good reason to believe that on one occasion advantage was taken of this discretionary power.

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[2] Oddly enough, according to the evidence placed before the Royal Commission by the Scottish Home Department (Cmd. 8932, para. 44), Scotland, likewise, has never known a case involving the survivor of a suicide pact, or a mercy murder.

Even clearer evidence of this independence of the Governor in matters pertaining to the Royal Prerogative exists in the proviso which declares that "these special instructions shall not apply in the case of treason or treason felony." No great importance need be attached to this proviso so far as treason felony is concerned, it not being a capital crime, but in the case of treason it is almost inconceivable that, should the question of a reprieve ever arise, the Governor of Northern Ireland would reach a decision without first seeking the collective advice of the Cabinet. So far as the present writer is aware no official explanation has ever been put forward for the divergence from English practice in cases of murder, though one theory suggests that it was thought desirable in 1922 to extend the responsibility when considering the question of reprieves for political murderers. Paradoxically, as has already been shown, such a decision has only once arisen in the history of the Province.

Unwise though it may be to draw any positive conclusions from any differences in the actual exercise of the Royal Prerogative by the respective countries, certain facts may be noted in Northern Ireland. In respect of the 147 murders known to the police thirty-three convictions have been recorded with, in some instances, two or more persons being convicted for their participation in a single murder. Four of the persons convicted were found insane, and in another four cases the jury added either a strong or a simple recommendation to mercy as a rider to their verdict. On each such occasion the death penalty has subsequently been commuted.[3] Only once has a conviction for murder been quashed and the prisoner released, this situation arising out of the jury separating during the course of the trial (*R.* v. *Taylor* [1951] N.I. 57), and only one case is recorded in which the Court of Criminal Appeal has substituted a verdict of manslaughter. As to the remainder, no woman has ever been hanged in Northern Ireland, and of the eleven men who have been executed—the last occasion was in 1942—the background to the killings covered mainly robbery with violence and sexual assault, with single instances of political murder, stabbing in the course of a quarrel between two American soldiers over the payment to a prostitute, and a putative father's shooting of the mother of his illegitimate child.

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[3] For a comparison with the reprieves granted in England and Scotland respectively following recommendations to mercy, see the Royal Commission's Report, paras. 31–35.

### *Life imprisonment*

The principles governing the length of detention of Northern Ireland prisoners convicted of murder and whose sentence has been commuted to life imprisonment appear to be the same as those applicable in England and Scotland.[4] The maximum period served by a male prisoner has been ten years, though the majority of such cases have been released after serving between five and eight years. With female prisoners who have been reprieved eight years has been the maximum period of detention, the normal period ranging between four years and seven years. Much of the natural doubts engendered in some people's minds regarding the policy which permits the release of convicted murderers is caused by the fear that such persons, once released, will proceed to commit other murders. Not only does this attitude take no account of the wide variety of circumstances underlying the crime of murder but all the evidence points to the fallacy of this widely held opinion. Thus, in reply to a question in the Westminster Commons the Home Secretary recently stated[5] that of the 210 reprieved murderers who were released on licence between 1931 and 1955 only one case had arisen in which a second conviction for murder had been returned. No reference, it is true, was made to other convictions, for example, for crimes of personal violence, but it is interesting to observe that in Northern Ireland during the period 1922–1955 of those reprieved murderers who have returned to civilian life not one such person has been convicted subsequently of another crime.

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[4] A summary of the relevant principles is given in the Royal Commission's Report, para. 644. For providing me with the information contained in this part of the article I have to thank Mr. L. F. Thompson, Governor of H.M. Prison, Belfast.

[5] H.C. Debates, Vol. 548, col. *157*; February 6, 1956.

*"Detained during Her Majesty's pleasure"*

Northern Ireland has no institution like Broadmoor specially designed for the detention of violent and dangerous criminal lunatics. Instead, every prisoner who is found insane on arraignment or insane under the M'Naghten rules—in common jargon what are known as "Queen's pleasure lunatics"—is sent to one of the six mental hospitals in the Province. In the event of any such person being found on admission "to be suffering from arrested or incomplete development of mind" power exists in the Governor of Northern Ireland, under the Mental Health Act (N.I.), 1948, s. 37, to declare by order that such criminal lunatic is a person requiring special care. Each mental hospital has a block assigned for such lunatics and is designated a "special care institution," where they are detained and treated separately from the other insane criminals kept in custody at the hospital. When this legislation came into force in 1951 all thirty criminal lunatics then detained were specially examined to see whether they were suitable for this special-care treatment; in all nine were declared to be "special-care" cases. If Northern Ireland, in this respect, is responsible for introducing a new terminology it is also worth noting that it has not seen fit to adopt the terms "Broadmoor patient" and "Broadmoor institution," introduced by the Criminal Justice Act, 1948, in place of the sometimes contradictory descriptions "criminal lunatic" and "criminal lunatic asylum."

When discussing the absolute obligation imposed upon the Home Secretary, under the Criminal Lunatics Act, 1884, s. 2 (4), to order a medical inquiry where there is reason to believe that a prisoner under sentence of death is insane, the Royal Commission on Capital Punishment in its Report (para. 262) drew attention to the fact that there is no corresponding obligation in Scotland to hold a medical inquiry. As with Scotland, so too in Northern Ireland no statutory duty exists which makes it incumbent on the Minister of Home Affairs to appoint medical commissioners to examine any such doubtful cases. In practice, however, so the present writer understands, it is the custom to appoint a medical practitioner with special psychiatric qualifications and experience to advise the Minister as to the prisoner's sanity. Scotland, with its doctrine of diminished responsibility, has found the necessity for such inquiries considerably minimised, but in England, according to the Royal Commission (Report, para. 372): "It will always be essential to retain the existing [statutory] provisions as a final safeguard against the execution of an insane person." So far as the substantive law of insanity is concerned Northern Ireland follows English law rather than Scottish law and, therefore, it is suggested the same safeguard as that embodied in the Criminal Lunatics Act, 1884, should be introduced into Northern Ireland law. Only by so doing will it be ensured that no injustice is caused to a person under sentence of death as to whose sanity there is doubt.

In a brief but valuable survey of the law and practice relating to Broadmoor patients ((1951) 11 *Cambridge Law Journal* 57) Dr. R. M. Jackson successfully disposes of the myth that criminal lunatics are normally detained for life, but no distinction is drawn by the writer between insane murderers and other insane criminals. Tables are given showing the number of criminal lunatics committed to, and discharged from, Broadmoor and county or borough mental hospitals during the period 1934–1938, from which the writer deduces that more than half the inmates are at one stage or another discharged. But neither these tables nor subsequent statistics provide answers to the interesting questions—what proportion of insane murderers are absolutely or conditionally discharged? ; and what is the maximum period of detention for murderers who are either found guilty but insane or insane on arraignment? According to the 1954 *Criminal Statistics* for England and Wales (Cmd. 9574, Table XX), of the 518 persons originally charged with murder and detained as Broadmoor patients at the end of 1954, 108 had already been kept in custody for a period of twenty years or more, and 251 for a period ranging between five years and twenty years. As might be expected, these figures are nowhere approached by persons detained as the result of being charged with other crimes, though in cases of attempted murder, felonious and malicious wounding there are thirty-one, thirteen and fourteen persons respectively who are still detained after the lapse of twenty years or more.

It may be of interest to compare the position in Northern Ireland[6] where no case is yet recorded of an insane murderer having been absolutely discharged. Two cases, on the other hand, have arisen in which conditional releases were given—in one of these the prisoner, first detained in 1906 following a verdict of guilty but insane, was conditionally discharged in 1931 but the order was revoked in 1937 and the inmate died in the mental hospital in 1945. More recently, a female prisoner charged with murder and found unfit to plead on the grounds of insanity was committed in 1944 and conditionally released in 1948, only to die eighteen months later. As for the general picture in Northern

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[6] I am indebted to the Ministry of Home Affairs at Stormont for so readily making available a full history of all criminal lunatics detained in Northern Ireland mental hospitals in 1922 and those committed since that date.

Ireland at the end of 1954, of the eight persons originally charged with murder and detained as Queen's pleasure lunatics, two only had been in custody for over twenty years, the remainder varying between two years and seventeen years. Quite a different story is revealed on examination of the periods of detention of other insane criminals. Thus, there is the case of a man charged with larceny as long ago as 1897 and found unfit to plead who was still detained at the end of 1954—at the time of his committal he was eighteen years old and he is now a septuagenarian. This person was declared a " special care " case in 1951. Another remarkable case is that of a woman found unfit to plead to a charge of malicious wounding in 1908, when she was forty-six years old, and who was still detained in 1954 at the ripe old age of ninety-two. Both these cases are, of course, exceptional but it is noticeable that of those charged with crimes other than murder and detained at the end of 1954, the highest proportion comprised those who had already been in custody for upwards of twenty years.

# The Road Traffic Act, 1956—New Provisions[1]

By HAROLD CASSEL AND MICHAEL HAVERS,
*Barristers-at-Law*

*Driving licences*

Driving licences, other than provisional ones, granted after the coming into operation of section 48 of the Act are to remain in force for three years and to cost 15s.; for the first two years, however, certain groups of applicants who have previously held licences, other than provisional ones, may get yearly licences issued to them, so that the work of the licensing authorities may be evenly spread. When the holder of a limited licence only, applies for one less limited and is eligible for the latter, he can choose to pay only 5s. for the new one instead of 15., but it will then remain in force no longer than the old one, which has to be surrendered, would have done (s. 48 (2)). A driving test must now be taken by any person who has not passed such a test nor held a licence during the previous ten years (s. 16).

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[1] For a general review of the Act and consideration of changes in offences, see [1956] Crim.L.R. 608, 673. As to dates on which various provisions come into operation, see p. 778, below.

Another change in the law relating to the issue of driving licences is that by section 10 (operative November 1, 1956) the Minister is empowered by regulation to raise above 16 years the minimum age at which a licence to drive a motor-cycle, or one of any prescribed class, or description, may first be held.

Provisional licences are to be for six months now instead of three, and will cost up to 10s., as fixed by the Minister. By section 18 of the Act licensing authorities are empowered to refuse applications for provisional licences where the applicant has held provisional licences before in both the preceding two years, unless before applying for the licence he applies to be tested before it will expire. In addition, he must either have been tested during the currency of his last provisional licence, or satisfy the licensing authority that he had reasonable cause for not having done so.

The power to compel production of licences and other documents has been much extended by section 31 (operative November 1, 1956). Where a licence has been revoked on the ground that the holder suffers from a disease or disability which makes it unsafe for him to drive, or where a police constable has reasonable cause to believe that a false statement has knowingly been made for the purpose of obtaining a licence, the holder may in either case be required by the constable to produce it to him, and has then the option of producing it then and there or within five days at any police station he specifies. Failure to produce it is punishable with a £5 fine. Any person who *is* accompanying a learner-driver may be required to produce his own licence and give his name and address and those of the owner of the vehicle. The following persons must do the same and, in addition, produce their insurance certificates and, in relation to ten-year-old vehicles, their test certificates:

(a) any person a police constable has reasonable cause to believe was the driver of a vehicle involved in an accident;

(b) any person a police constable has reasonable cause to believe has committed a motoring offence.

If such a person as is mentioned in (a) or (b) above is a learner-driver, then any person a police constable has reasonable cause to believe *was* accompanying him may be required to produce his own licence, and give his own name and address and those of the owner of the vehicle. Anyone who accompanies, or has accompanied, a provisional licence holder, including presumably a five-year-old child, is subject to these requirements, not only the licence holder exercising supervision over the learner-driver in accordance with the Motor Vehicles (Driving Licences) Regulations, 1950 (S.I. No. 333). Ignorance of the name and address of the owner of the vehicle would presumably not be a defence to a charge of failing to give it, though we suppose a person who does not hold a licence at all cannot fail to produce "his" licence. It is noteworthy that no definition of owner is given for the purposes of this section, nor is the 1930 Act definition of owner incorporated, though other definitions are.

*Passenger vehicles*

There have been changes with regard to passenger vehicle licences. Section 61 of the Road Traffic Act, 1930, under which public service vehicles have been defined and classified, has been repealed, and replaced by a new code contained in sections 39 and 40 and Schedule 6 to the new Act (operative October 1, 1956). A vehicle is to be a "public service vehicle" if used for carrying passengers for hire or reward, and is adapted to carry eight or more passengers, or, if not adapted to carry so many, is carrying passengers at separate fares. Unless adapted to carry eight or more, a vehicle carrying passengers at separate fares in circumstances in which the conditions in any of the four parts of Schedule 6 are fulfilled is not to be treated as a public service vehicle. The conditions in Part I are that the journey must be made on the occasion of a race meeting, public gathering or other like special occasion. The conditions in Part II are that not more than four persons may be carried; there must be no advertisement of the facility; the journey must not be in conjunction with any service provided under a road service licence by the vehicle owner, nor with any service in which he has an interest. Furthermore, if the passengers are being carried in the course of a business of carrying passengers, the driver, owner, or anyone else interested in the vehicle, or paid for arranging the journey, must not have initiated the agreement under which the separate fares are paid. Part III is new; its conditions are that each of the passengers making the journey must have been outside Great Britain at the time of concluding his arrangements to make the journey. The Part IV conditions require that the arrangements for bringing all the passengers together must have been made otherwise than by the holder, if any, of the public service vehicle licence for the vehicle, or, otherwise, by the driver, owner or person having an interest in it. There must be no previous advertisement of the facility. All the passengers must be carried to the vicinity of the destination, or the greater part of the tour, and there must be no differentiation of fares on the basis of time or distance; nor, if the journey is to a particular destination, must the passengers include any who habitually make that journey, or substantially that journey, at or about that time of day.

If adapted to carry eight or more passengers, a public service vehicle will not require a road services licence if it satisfies the conditions of Parts III or IV of Schedule 6 above, and the holder of the public service vehicle licence in respect of it makes a record of the prescribed particulars of the journey and the circumstances of its arrangement.

Two further points may be noticed; in any case where one or more passengers are being carried for hire or reward otherwise than in the course of a business of carrying passengers, the vehicle is to be treated as carrying passengers at separate fares; and for the purposes of Schedule 6 an announcement made, or a notice displayed, in church or chapel, or in a local church periodical, is not to count as an advertisement of a journey otherwise within Schedule 6.

### *Carriers' licences*

The Act, by sections 43 and 44 (operative November 1, 1956), touches, too, on carriers' licences. An additional ground for the revocation or suspension of a carriers' licence, or for a direction removing a vehicle from or reducing the number of vehicles specified in a licence, will be the conviction in relation to an authorised vehicle of the holder, or any servant or agent of his, of an offence of failing properly to maintain a vehicle, contravening speed limits, or regulations as to weight or loading, contravening the requirements as to drivers' hours of rest and continuous duty, and failing to keep the prescribed records. Yet a further ground for reservation or suspension will be that the use of an authorised vehicle has been prohibited under section 17 of the Road and Rail Traffic Act, 1933, as unfit or likely to become unfit for service. The licensing authority is not to suspend or revoke a licence on any of these grounds unless he is satisfied, after a public inquiry, if the licence holder asks for it, that owing to the frequency of such convictions or prohibitions, or the wilfulness of the act or omission leading to the conviction or prohibition or the danger to the public involved therein, the licence should be revoked or suspended, or the direction given. With these provisions in force, carriers have a very real interest in ensuring that their employees abide by the law. One oddity in drafting catches the eye, however, The licensing authority is to have regard to the wilfulness of the act leading to a conviction or the frequency of such convictions. The wilfulness must be, in relation to contravening a speed limit, an act by the driver, the convictions may be convictions of the driver; he may be as wilful as he likes without the employer having any opportunity to exercise any control over him; he may have been convicted dozens of times without a fresh employer knowing anything about it; the most the employer can do in either case is, perhaps, to dismiss him afterwards. It would be hard if the employer's licence was to be revoked in such circumstances, and yet that is what the Act appears to envisage. Such convictions or prohibitions are to be included in the objections which a licensing authority has a duty to consider on an application for the grant or variation of a carrier's licence. Another ground for the suspension or revocation of a carrier's licence is persistently charging for the carriage of goods below cost so that other licence holders have been put at an unfair disadvantage. Proof of such a case will present endless difficulty.

### *Test certificates*

The condition of public service vehicles adapted to carry eight or more passengers is already subject to strict supervision. Under the new Act all other vehicles first registered more than ten years before the time at which they are used will require a test certificate, unless belonging to a class or description exempted by the Minister. The ten-year period is subject to reduction by ministerial order approved by resolution of each House of Parliament. To use, or cause or permit to be used on a road any vehicle requiring a test certificate in respect of which none has been issued is a summary offence punishable on first conviction with a fine of £20, and on subsequent conviction with a fine of £50 or three months' imprisonment. Provision is made for regulations prohibiting the issue of a road fund licence in respect of a vehicle requiring a test certificate, without its production or evidence of its issue (s. 2). These test certificates are to be issued after examination of the vehicles by Ministry or council inspectors, or by authorised examiners, who, though authorised, are not to be Ministry officers. What sort of examination is to be carried out, and how applications for examination are to be made are all to be the subject of regulations. If a test certificate is refused, a notification of refusal stating the grounds on which it is based must issue, and any person aggrieved by the refusal or the grounds for it may appeal to the Minister; presumably, the right of appeal against the grounds is intended to be exercised by the man who does not dispute that his vehicle is not eligible for a test certificate, but maintains certain of the things complained of are in fact in good order, and that the vehicle can be made fit to pass examination without anything being done to them. The time for appealing, the manner in which appeals may be brought, and the fee payable, are all matters which are to be provided for by regulations. These will provide that some or all of the fee is to be repaid when it appears to the Minister that there were substantial grounds for contesting the whole or part of the decision appealed against. There may be substantial grounds for appealing against a decision, and the appeal may none the less be dismissed; it would seem that in such circumstances Parliament intends that the appellant should have his money back. The penalties under the Act of 1930, s. 112, for forging, possessing colourable imitations of licences, etc., and for making false statements for the purpose of obtaining or preventing the grant of a licence, are to apply to similar acts in relation to test certificates (s. 1).

*Examination of vehicles on the road*

Most confusingly the expression " authorised examiner " is used in another section, section 3 of the Act, to designate quite different people acting for quite different purposes. The function of authorised examiners under this section is to test vehicles on the road to see whether they comply with the statutory requirements as to brakes, silencers, steering, tyres, lights and reflectors, and to point out to the driver of the vehicle any deficiencies. Authorised examiners for these purposes are any of the following: any public service vehicle certifying officer or examiner, any road service vehicle examiner, any public carriage inspector, any person appointed by the Minister for these purposes, any police constable authorised by the chief officer of police. All these, except the authorised police constable, must produce their authority to act for the purposes of this section if required to do so. Whether the police constable must do so is doubtful, for this requirement is imposed upon " a person appointed as aforesaid." All the other classes of examiners are referred to as " appointed," and police constable as " authorised "; and yet the arrangement of the section is such that one would expect all examiners to be included. Moreover, elsewhere in the very same section express mention is made of a " police constable in uniform," who alone has the power to stop vehicles for testing, whereas, in relation to this power nothing is said about uniform, so that Parliament envisages testing by an overalled rather than a uniformed policeman, and one can see no reason why the former should not produce his authority if required, and every reason why he should.

If a police constable thinks it ought to be done, he may require a test to be carried out there and then of a vehicle involved in an accident or of one manifestly defective. In the former case there is power, if the tester is to be someone other than the constable who requires the test to be made, to require that the vehicle be not taken away until the test has been carried out. In the latter case there is no such power. If, therefore, a police constable, who is not authorised to test vehicles for these purposes, requires that a manifestly defective vehicle be tested forthwith, does the driver who drives the vehicle away before an authorised examiner arrives fail to comply with a requirement of the section, which, together with obstruction of an authorised examiner acting under this section, constitutes an offence punishable on summary conviction with a fine of £20? If driving the vehicle away is a failure to comply with a requirement of the section to have the vehicle tested forthwith, why is it necessary to confer a power to detain in the case of an accident? If not, what meaning is to be given to the word " forthwith " used in relation to both vehicles involved in an accident and to ones manifestly defective? The simplest solution of the problem would be to tell police constables not to bother about defective vehicles unless authorised to test them themselves.

With the two exceptions just considered, the driver of a vehicle proposed to be tested may elect that the test be deferred to a time and place fixed, within limits, by himself, if the owner, and if not, by the owner. For testing purposes only, if the vehicle is being used under an international permit, the permit holder will be deemed to be the owner, otherwise, if the vehicle is in the possession of any person under a hire-purchase agreement or hiring agreement at the time of the electing a deferred test, then that person will be deemed to be the owner. Whoever has the election may specify a period of seven days, falling within the next thirty, within which the test is to take place, and may specify the premises on which it is to take place, or, if he chooses, may specify a county borough, county district, or London as the area in which it is to take place. Notice must be given of the time when the test is to be carried out, being not less than two days when a period has been specified, and not less than seven days when this has not been done. If no premises have been specified, or the premises specified are not convenient for the test, the notice will also designate the place at which it will be carried out, which will be within the area specified, if any. It is the duty of the owner of the vehicle to produce it for testing (Schedule 1).

### *Traffic regulation*

In its attempt to solve the problem of traffic congestion, the sections dealing with the regulation of traffic are probably more important than those, more publicised, which deal with parking places. Section 33 confers upon local authorities, councils of counties, county boroughs, and boroughs or urban districts with a population of over 20,000, the power to make, without reference to or confirmation by anyone at all, in relation to any road in its area an order making it one way, specifying on what part of the road traffic must travel, and prohibiting or restricting waiting, loading or unloading. Where the Minister makes or confirms them, orders can be made prohibiting, restricting or regulating the use of a road in any way, of which a number of examples are given. One is " prohibiting the use of roads by through traffic." Wisely, perhaps, " through traffic " is not defined, and it will be left to the courts to decide whether the driver's intention to stop for tea if he sees a nice place for it, will remove his vehicle from the prohibited category of " through traffic." It is disturbing to see that these powers to make orders may be exercised not only to reduce danger on the roads, to prevent damage to them, or to speed traffic over them. They may also be exercised to prevent vehicles using a road, or using it in a particular way, if the vehicles, or the way they are used, are unsuitable having regard to the existing character of the road or adjoining property. This is not traffic regulation, it is town planning. Section 35 contains a new definition of " traffic sign " failure to conform to which is an offence. This new definition will include a line or mark in the road which under the old definition would have been held not to be a traffic sign: *Evans* v. *Cross* [1938] 1 K.B. 694. However, it is failure to conform to the " indication given by the sign " which is an offence. Traffic signs are " for conveying warnings, information, requirements, restrictions or prohibitions," but not for giving " indications " at all. We assume that only signs conveying requirements, restrictions or prohibitions are capable of giving " indications " with which the motorist must conform; if we are right, drivers may still cross the white line without committing an offence, for it conveys only a warning.

### *Parking places*

No useful purpose would be served by repeating the outline of the parking place scheme which found a place in our first article (see [1956] Crim.L.R. 610). A guide to the provision, section 22, creating offences in connection with it may be helpful. Offences which only the driver of a vehicle who leaves it in a parking place can commit are contravening any order as to the way vehicles shall be driven in or out, or as to the way in which they are parked in one of these places, failing to pay any charge, leaving the vehicle for longer than permitted. Any person, driver or not, will commit an offence who fails to comply with any order of the Minister relating to a parking place. These offences are to be punishable on summary conviction with a fine of £5, or in case of a second or subsequent offence with a fine of £10. In addition, if the defendant is found guilty of an offence of failing to pay any charge, the court must order the payment of the amount due which will be recoverable as a penalty. For some reason, connected one suspects with the vagaries of parking meters, it is provided that in proceedings for failing to pay an excess charge, if it is not proved that the excess charge had become due, but is proved that the initial charge has not been paid, then the defendant may be convicted of failing to pay the initial charge. Any person who, with intent to defraud, interferes with a parking meter, or operates or tries to operate one with anything but a coin of the correct value, is liable on summary conviction to a fine of £50 and imprisonment for three months.

### *Crash helmets*

Section 42 of the Act is devoted to crash helmets, providing for the regulation of their shape, construction and " any other quality." The sale or offer for sale, unless for export, hire or offer for hire of a crash helmet of an unauthorised type is a summary offence punishable with a fine of £20, or, in the case of a second or subsequent offence with a fine of £50 and three months' imprisonment. Elaborate provision, on the pattern of the Food and Drugs Act, 1955, ss. 113, 114, 115 and 116, is made by Schedule 7 of the Act, for pleading a written warranty as a defence to a charge under this section, and for bringing before the court the person alleged to be really responsible, if not the ultimate seller, or offerer for sale.

So concludes this survey of an Act which contains so many doubtful points of interpretation, and imposes such heavy penalties that it will surely be a good Act for lawyers; whether it will be good for anyone else remains to be seen.

# Practice and Procedure

## Period of Residence Requirement in Amending Probation Orders

The power to make probation orders is given by section 3 of the Criminal Justice Act, 1948, and subsection (4) empowers the court to make orders which " may include requirements relating to the residence of the offender: Provided that— . . . (*b*) where the order requires the offender to reside in an approved probation hostel, an approved probation home or any other institution . . . the period for which he is so required to reside . . . shall not extend beyond twelve months from the date of the order." The provisions as to amending probation orders are contained in the First Schedule to the Act, and in accordance with paragraph 3 " the supervising court may . . . by order amend a probation order by . . . inserting therein (either in addition to or in substitution for any such requirement) any requirement which could be included in the order if it were then being made by that court in accordance with the provisions of sections 3 and 4 of this Act: Provided that— . . . (*b*) the court shall not so amend a probation order that the probationer is thereby required to reside . . . for any period exceeding twelve months in all ; . . ." It is suggested that the restrictions on the period of residence requirements imposed in respect of amending orders in the Schedule are difficult to reconcile with those in respect of original orders in the section. The section specifically limits the period of residence on the making of an order to twelve months *from the date of the order*. May, then, a court amend an order by inserting a requirement of residence for a period extending twelve months from the date of the *amending* order? On the face of it the court may do this ; the requirement being one " which could be included in the order if it were then being made by that court." But if this is so the plain intention of the restriction sought to be imposed by the proviso to section 3 (4) is very easily circumvented.

The words of the proviso in the Schedule, " period [not] exceeding twelve months in all " may now be considered to see if they offer any guidance on this question ; also to see what direct effect they have of themselves. If the original order contains a requirement of residence of less than twelve months, for example, of six months, what are the powers of the court? It appears on any possible construction of the words " twelve months in all " that a period commencing immediately on the termination of the initial period may be of anything up to six months ; but it is not obvious what the court may do if there has been an interval. May a further six months still be required? The two periods of six months considered together would appear to satisfy the restriction " period [not] exceeding twelve months in all." It may not, however, be quite certain that this is so. According to Stroud's *Judicial Dictionary* " a period means a time that runs continuously," and this definition precludes two detached periods from being considered together so that the combined length of time may be treated as one period. If it used the word in this restricted sense it seems that the legislature, when framing the proviso, must have contemplated an additional period only as following immediately upon the preceding period. But even if this is the case such a combined period would not necessarily be wholly within a period of twelve months from the date of the original order; the first period of six months could have been fixed to commence six months after that date. And if two detached periods may be considered as forming one combined period, still more so may such a period extend beyond twelve months from the date of the order fixing the initial period. It appears then that upon no reasonable interpretation can the words "period [not] exceeding twelve months in all" in respect of amending orders be considered as limiting the period of residence that may be required under such an order to twelve months from the date of the original order. In fact if it had been the intention of the legislature to accomplish that it seems obvious that instead of "in all" the words "from the date of the original order" would have been used. These words are indeed used in that part of the proviso relating to extending the probation period. Too much weight, however, should not be attached to this distinction in support of the conclusion indicated, because the effect of this provision is found to be equally uncertain when considered in relation to the corresponding words of the section, which restrict the probation period simply to three years, and not three years from the date of the order. The position here is thus the reverse of that under consideration; a court may seemingly make an order for a supervision period of three years commencing at a future date, but when amending the order the court may not extend the period "beyond the end of three years from the date of the original order." When considering this apparent confusion of thought one is tempted to conclude that these provisions of the statute have been loosely drafted.

There does, nevertheless, appear to be a possible explanation for the granting of more extensive powers to amend probation orders than those to be exercised when making an order. Although in each case when a probation order is made and when it is amended the offender may refuse to comply with the proposed requirements, yet the temptation to assume more onerous liabilities than one would otherwise willingly undertake is greater when the alternative may possibly be imprisonment, as is the case when an original order is being made, than when there is no immediate sanction to be feared, as when an order is being amended. But this argument may not be sufficiently convincing to serve as a pointer when interpreting the strict letter of the statute. [G. S. CHAMBERS.]

# Summary Justice

## *Animals*

Cockfighting. Permitting premises to be used for cockfighting, having an appliance used in connection with cockfighting and assisting in cockfighting; fined £50 for first offence, £20 for second and £10 for third; ordered to pay £15 costs; Williamson; thirty-five other people concerned with cockfighting also fined amounts ranging from £10 to £80: Chester Magistrates' Court (*The Times*, September 15).

## *Assault*

Malicious wounding. Conviction of malicious wounding and sentence of one month's imprisonment passed on Nigerian who cut off some of a woman's hair quashed on appeal to quarter sessions; defence that he had cut it off with woman's consent in order to relieve her headaches; Oyesiku: Essex Quarter Sessions (*Manchester Guardian*, September 10).

## *Damage*

Maliciously damaging shop window worth £30; man who hired television set tired of returning it for repairs threw it through the window of the shop from which he had hired it; fined 1s., ordered to pay £20 costs to shop owners; Walsh: South-Western Magistrates' Court (*The Daily Telegraph*, September 22).

Maliciously damaging a register of births to the value of 1s., the property of the Registrar-General; cost of repairing register £4 18s.; father objected to entries concerning son's birth and tore out page; fined £3, ordered to pay £5 6s. costs; Tallentire: Kingston Magistrates' Court (*The Daily Telegraph*, September 18).

## *Larceny*

Flower. Stealing a flower valued at 8d. from front garden of Kensington house; man and woman each fined £5; Fergus, Shanks: West London Magistrates' Court (*The Times*, October 5).

*Local by-laws*

Climbing 10 feet up a tree in the grounds of Porchester Castle in order to retrieve bicycle clip; fined 10s.; Hickish: Sarum Magistrates' Court (*Evening Standard,* September 10).

Fishing. Fishing in the River Dee without a licence and being in possession of a snatch with the intention of taking salmon, trout or freshwater fish from the river; fined £17 5s.; Diggory: Llangollen Magistrates' Court (*Liverpool Echo,* September 17).

*Road traffic*

Careless driving. Driver driving bus without due care and attention, conductor distracting driver's attention while the vehicle was in motion; conductor passed sweets through window to driver while bus was travelling; each fined £3, and ordered to pay 7s. costs; Watkins, Armstrong: Watford Magistrates' Court (*Manchester Guardian,* September 21).

Careless driving. Man, aged 83, driving without due care and attention; two previous convictions in 1950, 1955; passed medical and driving tests two years previously; fined £20, disqualified from driving until he passed further driving test; Bradford: Taunton Magistrates' Court (*Manchester Guardian,* September 4).

Careless driving. "L" motor-cyclist, aged 16, driving without due care and attention; fined £2, licence endorsed: Rochdale Juvenile Court (*Manchester Guardian,* October 3).

Careless driving. Failing to give way to a duck and her nine ducklings walking along road, running over one of them; fined £3, ordered to pay £3 13s. 6d. costs; Gurrin: Wimbledon Magistrates' Court (*Manchester Guardian,* September 6).

Defective vehicle. Having a 1931 sports car on which canvas was showing in three places on the front nearside tyre; the handbrake would not set in the "on" position; the exhaust expansion chamber was split along its entire length; the off-side door would not fasten properly; the bodywork was falling apart; the front number plates were loose; the front mudguard stay was broken; the whole mudguard bar, with the headlights, could be lifted four inches; the footbrake, when applied, pulled the car to the right; defence that "there was nothing liable to fall off"; fined £12; Turner: Fareham Magistrates' Court (*Manchester Guardian,* September 25).

Driving while disqualified and driving without third party insurance; actor trying to get to theatre, tried unsuccessfully to find other transport; sentenced to one month's imprisonment on first charge, fined £15 on the second; Newley: Bow Street Magistrates' Court (*The Times,* October 5).

Fumes. Two coaches emitting excessive smoke; drivers in each case fined 10s., owners fined £1 in the first case, £5 in the second; Wakely, Clark, Halls' Coaches, Hounslow Star Coaches: East Grinstead Magistrates' Court (*Evening Argus,* August 28).

*Weights and measures*

Petrol. Selling petrol in short measure and committing fraud by allowing a quantity of petrol which had been measured to remain in the delivery hose; fined £10 on first charge, £15 on the second; Davenport: Shrewsbury Magistrates' Court (*The Daily Telegraph,* September 22).

# Case and Comment *

**Building**—*Safety regulations—breach—cutting concrete*

FALLAIZE *v.* TROUGHTON & YOUNG [1] (Q.B. Divisional Court: Lord Goddard C.J., Ormerod and Donovan JJ.: July 16, 1956) ([1956] 1 W.L.R. 1079; [1956] 3 All E.R. 127).

B., in the course of his employment with the defendants who were installing electric cables in a power station, was drilling holes for rawlplugs in a concrete ceiling. For this purpose he was using a portable tool known as a Kango hammer which was driven by an electric motor and was fitted with a chisel or bit which was pointed at the end where it pierced the concrete. While operating the hammer, a piece of steel and concrete from the ceiling hit him in the eye and injured him. No suitable goggles or effective screens were provided to protect B.'s eyes. On a charge against the defendants of contravening reg. 84 of the Building (Safety, Health and Welfare) Regulations, 1948 (S.I. No. 1145), in having failed to provide goggles for a person employed in a process specified in Schedule 2, para. (2) to the Regulations, the justices dismissed the information. The prosecutor appealed.

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* Reported, unless otherwise stated, by Henry Palmer and J. D. Pennington, Barristers-at-Law. Commentary by J. C. Smith, LL.B. (Cantab), Barrister-at-Law.

[1] For the prosecutor: *S. B. R. Cooke* (instructed by Solicitor, Ministry of Labour and National Service). For the defendants: *John Thompson Q.C., E. G. H. Beresford* (instructed by Buller, Jeffries & Kenshole).

*Held*, allowing the appeal, that the operation in question was "cutting" concrete within Schedule 2, para. (2) of the Regulations and, accordingly, the defendants were in breach of reg. 84. [J. D. P.]

COMMENTARY. Regulation 84 of the Building (Safety, Health and Welfare) Regulations, 1948, provides that goggles must be supplied where any process specified in the Second Schedule to the Regulations is carried on. Paragraph (2) of the Second Schedule reads: "Cutting, dressing or carving of stone, concrete or similar materials by means of a portable tool driven by mechanical power." The argument which was accepted by the justices but rejected by the Divisional Court was that "cutting" must be construed *ejusdem generis* with "dressing" and "carving" in paragraph (2). The *ejusdem generis* rule is usually applied to restrict the meaning of a general term by reference to things *previously* enumerated and not—as it was sought to do in this case—by reference to things *subsequently* enumerated. See Maxwell, *Interpretation of Statutes* (10th ed.) 337. The modern tendency, moreover, appears to be not to apply the rule, even in the case of things previously enumerated, unless there is something in the document which shows an intention to limit the general words: *Anderson* v. *Anderson* [1895] 1 Q.B. 749 (will); *Chandris* v. *Isbrandtsen-Moller Co. Inc.* [1951] 1 K.B. 240 (charterparty). For an instance of the rule being applied to a criminal statute: see *Evans* v. *Cross* [1938] 1 K.B. 694.

**Evidence**—*Similar facts—indecent assault*

R. *v.* CARTER[2] (West Kent Quarter Sessions: Gerald Thesiger, Esq., Q.C., Chairman: September 12, 13, 14, 1956).

C. was indicted for indecent assault on a boy aged ten. The boy, who gave evidence unsworn, stated that the accused told him and his companions that they had been trespassing and one must take the punishment. He said the accused chose him, took him behind some bushes, asked him if he would go to the police or be smacked, and then handled him indecently and gave him a smack. Two boys aged twelve and ten confirmed that the accused had spoken as alleged and taken the boy behind bushes where they could not see what happened. He rejoined them later in a distressed state. All three boys, the latter two being sworn, identified the accused as the man concerned. The accused denied he was the man. The prosecution tendered four witnesses. The first, a policeman, was to prove that in 1950 the accused then aged fifteen, made a statement admitting indecent behaviour with another boy. The other three witnesses were youths of seventeen or eighteen each of whom was to prove that at some date in 1953 the accused had accosted him at approximately the same place in which the 1956 incident took place, had represented he was a policeman or park-keeper, and had handled the witness indecently, but not in quite the same way as alleged in the 1956 incident. The accused had denied the offences in 1953 but had been found guilty at West Kent Sessions and sentenced to nine months' imprisonment. The prosecution submitted that the evidence was admissible to prove a propensity in the accused to commit indecent assaults on boys and to help to identify him as the man concerned in 1956 by showing he had that propensity (*Thompson* v. *R*. [1918] A.C. 221) or alternatively that the evidence of the three youths as to what happened in 1953 was admissible to prove that the accused was the man in 1956 because the offence was the same and committed in the same way (*R*. v. *Straffen* [1952] 2 Q.B. 911).

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[2] For the prosecution: *Ian Percival* (instructed by the Director of Public Prosecutions). For the defendant: *Dorothy Knight Dix* (instructed by Cole & Matthews, Beckenham).

*Held*, that there was nothing, apart from the allegation of the offence itself, to show that the accused had a propensity to commit the offence and the evidence was not admissible on the first ground suggested by the prosecution, namely to prove propensity or habit. The prosecution were on rather stronger ground on the alternative submission as regards the testimony of the three youths about incidents in 1953. But if that evidence was not admissible as evidence of a personal habit, tendency, or propensity, but only as a method, technique or system of committing crime, it was admittedly very prejudicial and was open to a number of objections as regards its evidential value: (1) it had been disputed at the time and might involve investigating identification and " alibis " three years old; (2) the similarity was not exact; (3) the pattern of homosexual crime seemed to be peculiar to the crime as much as to the criminal; (4) each witness had been a boy in 1953 and was uncorroborated; (5) it was not at all clear to what extent the uncorroborated sworn evidence of boys as to separate incidents long ago corroborated the unsworn testimony of another boy. The court had a discretion whether to receive evidence that was admissible as logically probative of some material fact other than habit, disposition or propensity. Even if the 1953 evidence was admissible as tending to prove a technique or pattern of action characteristic of one person, it ought not to be received because of the objections mentioned above.

The additional evidence was not received. The accused was tried and found Not Guilty.

[John D'Cotta, *Barrister-at-Law*.]

COMMENTARY. Evidence of similar wrongful acts by the accused has been admitted for the purpose of proving (a) that the act now charged was committed: *Makin* v. *Att.-Gen. for New South Wales* [1894] A.C. 57; *R.* v. *Ball* [1911] A.C. 47; (b) that it was the accused who committed it: *Thompson* v. *R.* [1918] A.C. 221; *R.* v. *Hall* [1952] 1 K.B. 302; and (c) the intention with which it was committed: *R.* v. *Hall* (above). Such evidence has thus been used to establish all the elements which the prosecution are required to prove in any case. Lord Sumner in *Thompson* said that similar fact evidence is admissible only if it goes to establish an element in the prosecution's case which the accused has denied. Lord Goddard, delivering the judgment of the Court of Criminal Appeal in *R.* v. *Sims* [1946] K.B. 531, thought it admissible irrespective of the issues raised by the defence. In the instant case there was no difficulty on this point as the accused denied that he was the man and the evidence was tendered to prove that he was.

All evidence, in order to be admissible, must be logically probative—*i.e.,* such as to tend to convince a reasonable person of the existence (or non-existence) of a fact in issue. Similar fact evidence must pass a particularly stringent test in this respect, because of its prejudicial nature, and will only be admissible where it has great probative value. Probative value depends upon such factors as the degree of similarity in circumstances, proximity in time and place, etc. There must, moreover, be very cogent evidence that it was the accused who committed the similar acts; it was lack of such evidence that led to quashing of convictions in *Noor Mohamed* v. *R.* [1949] A.C. 182, and *Harris* v. *D.P.P.* [1952] A.C. 694. Contrast *R.* v. *Robinson* (1953) 37 Cr.App.R. 95. The evidence in the present case failed to pass these tests.

Even where a judge holds that similar fact evidence is admissible in law, he has a discretion to exclude it if he thinks that its admission would operate unfairly against the accused. The learned chairman in the present case took the view that even if he was wrong in holding any part of the evidence to be inadmissible in law, this was a proper case for exclusion in the exercise of his discretion.

For a detailed discussion of similar fact evidence, see Cowen and Carter, *Essays on the Law of Evidence*, IV.

**Indecent Assault**—*Evidence.* See R. *v.* CARTER, p. 772, above.

**Insanity**—*Disease of the mind—meaning of*

R. *v.* KEMP [3] (Bristol Assizes: Devlin J.: June 27, 1956) ([1956] 3 W.L.R. 724).

K., an elderly man of excellent character, was charged with causing grievous bodily harm to his wife by striking her with a hammer. At the time of the act he was suffering from arteriosclerosis and the medical evidence showed that he did not know what he was doing. The evidence, however, differed as to how he got into this condition. One view was that it was due to melancholia, induced by his disease, which was a disease of the mind. The other view was that the disease had led to a congestion of blood in K.'s brain causing a temporary loss of consciousness when he acted irrationally, but that there was not such a degeneration of the brain as to amount to a disease of the mind.

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[3] For the Crown: *Michael Lee* (instructed by the Director of Public Prosecutions). For the defence: *N. J. Skelhorn Q.C., K. H. Bain* (instructed by Farnfield & Nicholls, Warminster).

*Held*, that in order to bring in the special verdict under the Trial of Lunatics Act, 1883, of guilty but insane, there must be a defect of reason which had been caused by a disease affecting the mind; there would then be insanity within the rule in *McNaghten's Case* (1843) 10 Cl. & Fin. 200, 210. In the present case, the hardening of the arteries was a disease which was shown on the evidence to be capable of affecting the mind in such a way as to cause a defect, temporarily or permanently, of its reasoning and understanding, and was thus a disease of the mind within the meaning of the rule. The accused was accordingly found guilty but insane. [J. D. P.]

COMMENTARY. Where a man does not know the nature and quality of his act because of a defect of reason arising from disease of the mind he must be found Guilty but Insane; where he does not know the nature and quality of his act for some other reason he must be found Not Guilty, at least if the crime is one requiring *mens rea*. Though the verdict Guilty but Insane has been held by the House of Lords (*Felstead* v. *R.* [1914] A.C. 534) to be a verdict of acquittal, it differs in an important respect from a verdict of Not Guilty. A man found Not Guilty goes free; a man found Guilty but Insane may be detained during Her Majesty's pleasure.

In the present case Devlin J. distinguished *R.* v. *Charlson* [1955] Crim.L.R. 316 (where Barry J. directed the jury that they might find a verdict of Not Guilty) as a case where the accused did not know what he was doing for some reason other than disease of the mind. Yet there was some evidence in the earlier case that the accused's outburst of violence was caused by a cerebral tumour. It is not easy to reconcile this with the present decision, particularly as Devlin J. said that the law "merely has to consider the state of mind in which the accused is, not how he got there." The only significance of the words "disease of the mind" in his opinion was to exclude from the defence of insanity the man with a healthy mind who "had been brought up in such a way that he had never learned to exercise his reason." Clearly this would not have excluded Charlson. Barry J.'s direction is perhaps best explained on the ground that it was not argued before him that the right verdict was Guilty but Insane.

**Road Traffic**—*Insurance—driver under age—whether passenger had "control"*

EVANS *v.* WALKDEN [4] (Q.B. Divisional Court: Lord Goddard C.J., Ormerod and Donovan JJ.: July 11, 1956) ([1956] 1 W.L.R. 1019; [1956] 3 All E.R. 64).

A boy, who was under seventeen years of age and therefore disqualified from holding a driving licence, drove a motor-car along a road at between four and five miles an hour in bottom gear for about 200 yards. His father was seated beside him and was in a position to control the driving of his son and could have stopped the car immediately; the steering wheel was within reach of the father and so were the brakes and clutch pedals, the ignition key, and the gear handles on the steering wheel. The father had a full comprehensive insurance. The son was charged with using and the father with permitting the use of the car without there being in force an insurance against third party risks, contrary to section 35 of the Road Traffic Act, 1930. The justices were of opinion that, having regard to the decision in *Langman* v. *Valentine* [1952] 2 All E.R. 803, and to the degree of control being exercised by the father, he as well as the son was the driver of the car, and would under the terms of the policy of insurance have been indemnified against any third party claims. Accordingly, they dismissed the informations. The prosecutor appealed.

*Held*, allowing the appeal, and distinguishing *Langman* v. *Valentine*, that although the father may have been in control of his son and been in a position to assume control of the car, he was not in control of the car at the time that it was being driven by the son. Accordingly, both father and son were guilty of the offences charged.

*Per* Lord Goddard C.J.: *Langman* v. *Valentine* went as far as it was safe to go and should not be extended. [J. D. P.]

COMMENTARY. *Langman* v. *Valentine* decides that it is possible for two persons simultaneously to be drivers of the same car. If that occurs and one of them, but not the other, is covered by a policy of insurance, no offence contrary to section 35 (1) of the Road Traffic Act, 1930, is committed. The section is satisfied if the *use* of the vehicle on the road is covered against third party risks, even though there is no policy covering a person actually driving: *Ellis (John T.), Ltd.* v. *Hinds* [1947] K.B. 475. If, however, one of two joint drivers is unlicensed, he is guilty of driving without a licence contrary to section 4 (1) of the Act and the second driver, if he knows that the first has no licence, may be guilty of aiding and abetting.

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[4] For the prosecutor: *John Davies* (instructed by Horace W. Davies & Co. for J. Charles Hughes & Co., Dolgelley). For the defendants: *A. J. Irvine* (instructed by Amery-Parkes & Co.).

The distinction taken in the present case was that in *Langman* v. *Valentine* the licensed driver had one hand actually on the steering wheel and the other on the hand-brake, so that he was in control, and not merely in a position to assume control, of the car.

# Acts and Orders

## Agriculture

As to milk, see below.

## Animals

LIVE POULTRY (RESTRICTIONS) (AMENDMENT) ORDER, 1956 (S.I. No. 1439): operative October 1, 1956. The Order of 1954 (S.I. No. 121; [1954] Crim.L.R. 311) is amended. Geese and ducks may be moved alive from licensed sales of poultry intended for immediate slaughter. Between October 1 and December 31 in any year the power of local authorities to authorise the holding of a market, fair or sale of store poultry is suspended. The form of declaration to be made by a rearer of birds bringing or sending poultry to such an authorised market, fair or sale is prescribed.

For the powers of the police with regard to this Order see section 71 of the Diseases of Animals Act, 1950, and for penalties for its contravention, see sections 78–80.

## Customs and Excise

EXPORT OF GOODS (CONTROL) (AMENDMENT NO. 8) ORDER (S.I. No. 1497): operative October 1, 1956. The Order of 1955 (S.I. No. 518; [1955] Crim.L.R. 391) is amended. Licences are no longer required except for exports to China, Macao, North Viet Nam and Tibet for exports of meat and live animals other than horses. Licences are not required for the export of mercury to certain destinations.

## Food and Drugs

MILK (SPECIAL DESIGNATIONS) (SPECIFIED AREAS) (No. 2) ORDER, 1956 (S.I. No. 1409): operative October 1, 1956. In the areas specified in the schedule to the Order special designations must be used for the purpose of all sales of milk by retail for human consumption other than catering sales.

For penalties for contraventions, see section 106 of the Food and Drugs Act, 1955.

### Official Secrets

OFFICIAL SECRETS (PROHIBITED PLACE) ORDER, 1956 (S.I. No. 1438): operative October 1, 1956. The works and offices of the United Kingdom Atomic Energy Authority at Chapel Cross, Annan, Dumfriesshire, are declared a prohibited place for the purposes of the Official Secrets Act, 1911.

### Pest Control

IMPORTATION OF CARNATION CUTTINGS ORDER, 1956 (S.I. No. 1519): operative September 30, 1956. In addition to requirements imposed by the Importation of Plants Order, 1955 (S.I. No. 81; [1955] Crim.L.R. 196) cuttings of carnation plants may not be landed in England and Wales unless the plants from which the cuttings were taken and the plants from which such plants were derived were tested and found free from bacterial wilts or unless these diseases are not known to be established anywhere in the country in which such plants were grown.

For penalties for contraventions, see section 1 of the Destructive Insects Act, 1877.

### Police

POLICE (PROMOTION) REGULATIONS, 1956 (S.I. No. 1532): fully operative January 1, 1958. The Regulations of 1952 (S.I. No. 1707) and 1953 (S.I. No. 702) are revoked and replaced. Provision is made for qualifying examinations to be held by a central examinations board and a central examination agency instead of by individual police forces. Special provision is made concerning the Metropolitan police force.

See also p. 780, below.

### Probation

PROBATION (NO. 2) RULES, 1956 (S.I. No. 1520): operative October 1, 1956. Whole-time probation officers of the rank of senior probation officer or below who are mainly assigned to the Dartford petty sessional division may receive an allowance of £30 a year. Provision is made concerning salaries of senior probation officers.

### Road Traffic

ROAD TRAFFIC ACT, 1956 (COMMENCEMENT NO. 1) ORDER, 1956 (S.I. No. 1491): operative September 21, 1956. The following provisions of the Road Traffic Act, 1956 ([1956] Crim.L.R. 608, 673, and p. 758, above), came into operation on October 1, 1956:—

s. 4 (1) (permanent effect of speed limit)

s. 16 (exemption from driving test)
s. 39 (public service vehicles)
s. 40, Sched. 6 (public service vehicles)
s. 45 (construction of dual carriageways, roundabouts, street refuges)
s. 47 (1) (appeals relating to road service licences)
s. 49 (London and Home Counties Traffic Advisory Committee)
s. 50 (pedestrian-controlled grass cutters)
s. 51, Sched. 8 in part (minor and consequential amendments)
s. 52 (financial provisions)
s. 53 (1), (2) (application to Crown)
s. 54 (interpretation)
s. 55, except subsection (4), Sched. 9 in part (commencement, repeals, extent).

The following provisions come into operation on November 1, 1956:—

s. 7 (sale or supply of vehicles in condition in which use unlawful)
s. 8 (causing death by reckless or dangerous driving)
s. 9 (being in charge of vehicle when under influence of drink or drugs)
s. 10 (minimum age of driving)
s. 11 (application of driving offences to pedal cyclists)
s. 12 (use of footpaths and bridleways for motor-vehicle trials)
s. 14 (pedestrians' compliance with constables' traffic directions)
s. 26 (penalties and disqualifications, save in regard to fines imposed for contravention of order under section 46 of the Act of 1930)
s. 27 (duration of driving disqualifications)
s. 28 (appeal against finding of no special reasons for not disqualifying)
s. 29 (offences relating to compulsory third-party insurance)
s. 30 (warning of intended prosecution)
s. 31 (production and surrender of driving licences)
s. 32 (information as to identity of driver)
s. 43 (carriers' licences)
s. 44 (suspension or revocation of A and B licences)
s. 46 (pedestrian crossings)
Sched. 4 (disqualification and endorsement)
Sched. 8 in part (minor and consequential amendments)
Sched. 9 in part (repeals).

### Scotland

*Police*

POLICE (SCOTLAND) AMENDMENT (NO. 2) REGULATIONS, 1956 (S.I. No. 1534): operative October 8, 1956. Alterations are made in allowances.

# Practical Problems

*All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 3 Chancery Lane, London, W.C.2." The questions of subscribers only are answerable in the Review. All questions should be submitted in duplicate. The Publishers cannot accept any responsibility for the correctness of the replies.*

19. *Verdict on alternative count*

In *R.* v. *Roma* [1956] Crim.L.R. 46, Lord Goddard C.J. said that as a matter of practice where there are alternative counts of stealing and receiving, it is desirable that the jury should be discharged from giving a verdict on the count on which the prisoner is not convicted. If the jury is asked to return a formal verdict of Not Guilty, then the Court of Criminal Appeal would be unable to alter the verdict to a conviction on the alternative count. Does the same ruling apply to other cases where there are alternative charges? [T. W.]

### ANSWER

The remarks of Lord Goddard C.J. in *Roma* and in other cases seem to have been confined to cases of stealing and receiving; see, especially, *R.* v. *Seymour* [1954] Crim.L.R. 475.

It is not easy to see that there is any necessity to extend the Lord Chief Justice's remarks to other cases, because most cases of true alternative charges (*i.e.*, where the prisoner cannot possibly be guilty of both) are covered either by some statutory provision which allows a conviction for one on an indictment for the other (*e.g.*, section 44 of the Larceny Act, 1916), or by a common law rule such as the one which allows a conviction for manslaughter where the prisoner is indicted for murder and malice prepense is not proved.

Most cases of "alternative" charges, however, are really cases of a more serious charge brought with a less serious one, *e.g.*, robbery and simple larceny. Here a conviction of the greater offence necessarily involves a finding by the jury that the lesser offence is proved, and although no verdict is taken on the lesser charge, any further proceedings on such charge would be met by a plea of *autrefois convict*. A conviction of the lesser offence in practice involves that the more serious offence is not proven, since the jury are directed to consider the lesser charge only if they decide to acquit on the greater charge, and in our view it would be wholly indefensible to discharge the jury from giving a verdict on the greater charge with the object of allowing the Court of Criminal Appeal to substitute a conviction on that charge if the conviction of the lesser offence for some reason is upset. (It would be futile, too, since if the lesser charge fails, the greater charge, of which the lesser is part, cannot possibly succeed.)

It may perhaps be added that it is difficult to reconcile the remarks of the Lord Chief Justice in *Roma* and *Seymour* with the principle that once a prisoner has been given in charge of a jury he is entitled to a verdict. As Lord Goddard himself said in *R.* v. *Heyes* (1951) 34 Cr.App.R. 161: " Once a prisoner is in charge of a jury he can only be either convicted or discharged by the verdict of the jury; and as there was no verdict of the jury here, the trial was a nullity." [D. W. E.]

# Letters to the Editor

## The Female Prostitute

Sir,

I feel that if I had not been governed by the demands of space and brevity to condense such a complicated subject as the prostitute into so few pages, I might have avoided some of Mr. Lynch's interesting comments on my article at [1956] Crim.L.R. 611. The criminal practices engendered by syndicates to which I refer, are not those of the prostitute, but of the men who run her. In America, where most prostitution has been driven underground by repressive legislation, and is thus often highly organised, bribery of government officials and law enforcement officers, the distribution of narcotics, and murders and assaults are commonly resorted to by gangs managing groups of prostitutes in order to protect their " empires." It is probable that in these circumstances the protection and security, not to forget the discipline, given to the prostitute by her manager decreases the necessity and opportunity for her to indulge in criminal conduct in order to maintain her position.

I did not mean to suggest that full employment necessarily abolished one of the motives for prostitution, but that there were many women living normal lives, but with certain latent psychological features, who would resort to prostitution as an alternative to poverty or hard work if economic conditions deteriorated. In their cases, financial stability would prevent the occurrence of such precipitating factors. It would be a mistake to apply the economic law of supply and demand to so instinctual and bizarre a trade as prostitution. There will be fluctuations in prostitute populations for the reason given above, but sexual freedom nowadays is generally enjoyed amongst the poor as well as the rich. Italy for instance, a relatively poor country, has a larger prostitute problem than some of the wealthier Scandinavian countries. Whilst Soviet Russia, whose economic standards it is generally agreed have improved, claims to have eradicated prostitution entirely by social and rehabilitative measures. This only illustrates the contradictions encountered when applying rigid economic laws to prostitution.

On prostitution Mr. Hails and I will obviously never agree. In return for his spelling lesson, however, I should like to recommend him to read an illuminating textbook, *Psychiatry and the Law*, admirably reviewed at [1954] Crim.L.R. 808, which indicates clearly the necessity, in this modern age, for lawyers to have some knowledge of psychiatry and psychology. Whilst this heresy may cause some to recoil in horror, it should be recalled that doctors are trained in forensic medicine, and there seems no reason why lawyers should not profitably be trained in forensic psychiatry. The section in my article on the psychological aspects of prostitution was written with the help and guidance of an experienced member of the staff of a psychiatric clinic in Los Angeles, California.

Yours faithfully,
REX B. COWAN,
Solicitor.

*London.*

Sir,

I have read Mr. Cowan's article on the Female Prostitute at [1956] Crim.L.R. 611 with interest and profit. I think he has made a valiant effort to concentrate an extremely difficult and complex problem into a short article. I do, however, differ from him in his opinion about keeping the prostitute in custody at the commencement of treatment, for prostitution, in some cases, denotes a very deep psycho-sexual disturbance; coercion will never lead to the relationship with the doctor that is necessary for cure. It is very rare for prostitutes to come voluntarily to a psychiatrist; they are in the main pathological liars and often invent the story that they feel the investigator wants to hear. For this reason the scientific study of prostitution is fraught with difficulty.

This article, alone, however, would not have moved me to write this letter: it was the letters in answer to the article. Mr. Lynch's letter is a helpful and well informed letter, contributing to the knowledge of the subject. I would add, in passing, that in the "Call Girl" type of prostitute a number of them are known to be of great wealth and therefore the financial inducement cannot play a big part in their motivation.

It is the letter of Mr. Hails that I feel called upon to answer. In my opinion it is bigoted, retrogressive and uninformed (Kant was a philosopher, not a psychologist or psychiatrist). I do not know what qualifications Mr. Hails has to dismiss the whole of psychiatry as nonsense or humbug, or to dismiss it from the pages of the *Criminal Law Review.*

As a psychiatrist, and a barrister, I am glad to say that in my experience his viewpoint is not held by all lawyers or by the courts.

The law, like all other forms of rational thought, must go forward and not lag far behind scientific progress. I hope that the *Criminal Law Review* will long continue to publish articles dealing with such subjects.

Yours faithfully,
A. G. DAVIES,
M.B., B.S., L.R.C.P., M.R.C.S.,
Barrister-at-Law.

*Harley Street.*

### Magistrates' Courts—Submission of No Case to Answer

Sir,

I find myself surprised each time I read a letter like Mr. Joseph Yahuda's ([1956] Crim.L.R. 714) and wonder if I (and many others) are quite wrong in completely accepting the simple directions of Rule 17 of the Magistrates' Courts Rules, 1952 (and Rule 18 for complaints). Perhaps one day, the learned editor of Stone's *Justices' Manual* will explain precisely what the few lines on p. 238 (88th ed.) mean in practice—

> " On a submission of no case to answer, the court may, and indeed should, *as a matter of good practice*, put the advocate to an election either to rest his case upon the submission or to call evidence. If the advocate is not allowed such an election he should not be precluded from calling evidence if his submission fails."

Is it possibly the remnants of some of the " old sporting instincts " that have *had to die* with the advent of the highly complex civilisation with which we now (many of us reluctantly) abide?

Yours faithfully,
RAMSAY LAWTON,
Clerk to the Justices.

*Wellington, Salop.*

### Discretion in Prosecuting

Sir,

At [1956] Crim.L.R. 506 you include a letter from Mr. G. P. V. Creagh regarding the duty to report the withdrawal of prosecutions to the Director of Public Prosecutions with particular reference to charges of dangerous driving, and a note from Dr. Glanville Williams in reply. With respect to Dr. Glanville Williams, I do not think that his note is a full reply to the points raised in Mr. Creagh's letter.

Dr. Glanville Williams refers to regulation 6 of the Prosecution of Offences Regulations, 1946, but since, as he states in his original article, the prosecution cannot be withdrawn without leave of the court, regulation 9 is also in point. This regulation places a similar duty on the clerk to the justices or to the court, to report to the Director cases " in which the prosecution is wholly withdrawn or is not proceeded with within a reasonable time."

So far as clerks to the justices are concerned (and I am informed that the police follow a similar practice) this duty must be construed according to the directions contained in Home Office Circular No. 247/1946 of November 18, 1946, which provides that "The requirement to report under regulation 9 relates to cases which are wholly withdrawn or are not proceeded with within a reasonable time. Where proceedings are taken against a defendant on more than one charge, and only one charge is proceeded with, it would not appear that the proceedings should be regarded as wholly withdrawn within the meaning of the regulation, and accordingly there would appear to be no need in such a case for any report to be sent to the Director of Public Prosecutions." This makes it clear that where summonses are issued in respect of both dangerous and careless driving there is no need for the clerk to report to the Director if the court allows the summons for dangerous driving to be withdrawn. It is also submitted that, where proceedings are taken in respect of dangerous driving and the defendant is convicted of careless driving in accordance with the procedure in section 35 of the Road Traffic Act, 1934, it cannot be said that the proceedings have been "wholly withdrawn."

Yours faithfully,
A. BURT,
Deputy Chief Clerk.

*Bow Street Magistrates' Court.*

# Books and Periodicals

## Reviews:

*Delinquent Boys.* The Culture of the Gang. By Albert K. Cohen. London: Routledge & Kegan Paul, Ltd. 1956. 179 and (notes and index) 21 pp. (21s. net.)

Pleading for leniency on behalf of their sons at juvenile courts, countless mothers have protested: "He is a good boy at home and was never any trouble until he got into bad company." Professor Cohen, while recognising the complexity of individual motivation, also emphasises the importance of group influence on particular individuals. Although he uses the pattern of an American background to explain his proposition, the lesson can readily be applied elsewhere.

Professor Cohen maintains that when one observes a delinquency group, all the boys are doing things together, *i.e.,* sitting on the curb, standing on corners, smashing windows. These are joint activities, governed by a set of common understandings, common sentiments and common loyalties. They are the expression of solidarity and rebellion against a society which sets standards impossible for the delinquents to attain.

"Teddy Boys" and their origins have caused much speculation amongst us. Some understanding of how to tackle the problem might be obtained from an unbiased reading of this very interesting book.

JEAN GRAHAM HALL.

*Judicial Interpretations of the South African Criminal Procedure Acts (1917–1955).* By Charles W. H. Lansdown, B.A., LL.D., and E. F. Van der Riet, B.A., Barrister-at-Law, Judge of the Supreme Court of South Africa, assisted by G. N. Dock, M.A., Barrister-at-Law. Cape Town: Juta & Co., Ltd. London: Sweet & Maxwell, Ltd. 1956. xix and 511 and (index) 70 pp. (£5 14s. net.)

This book collects the various South African Criminal Procedure Acts and sets out after the appropriate sections extracts from the judgments in which the courts have interpreted the Acts. The editors hope that the book will serve a useful purpose as a " ready reference to the reports " to all those who are engaged in the administration of the criminal law. One feels that it will certainly do that. It is also a most valuable book for the student of comparative criminal procedure or evidence to have by him. It would, perhaps have been even more useful for this purpose if the editors had not refrained, as they have, from commenting on the judicial interpretation of the Acts.

J. C. SMITH.

*A New Study of Police History.* By Charles Reith. London: Oliver & Boyd. 1956. viii and 288 and (index) 6 pp. (18s. net.)

The book is divided into two parts and would be better entitled " The History of Sir Charles Rowan." The first part is mainly military history and the reason for taking up two-fifths of the book with this history is obscure. Presumably it was intended to show the source of Sir Charles Rowan's plan for the police, an object that could have been just as well achieved in twenty pages.

Most of the remainder of the book is devoted to an examination of the life and work of the first two Commissioners of the Metropolitan Police, Rowan and Mayne, and this part is easily the best and most interesting section of the book. Its value is enhanced by the inclusion of documents and letters hitherto unpublished.

The last chapter is entitled " The Failure of Police Administration " and is severely critical of present day administration. The ineptness of the Home Office is considered. The chapter would have been of greater value had more reasons been given. This is not a book for the everyday reader, but for those interested in police history it is well worth consideration.

P. A.

*Reserved Judgment.* By His Honour J. Tudor Rees. London: Frederick Muller, Ltd. 1956. 254 and (index) 5 pp. (21s. net.)

Judge Tudor Rees' experience of the law was very wide and was not limited to the civil courts. Although well known as a county court judge, he was also a magistrate and chairman of quarter sessions. This book of memoirs is well worth reading, giving as it does some refreshingly old-fashioned views on the subject of punishment.

P. A.

**Books Received:**

*The C.I.D. and the F.B.I.* By Richard Harrison. London: Frederick Muller, Ltd. 1956. 196 pp. (13s. 6d. net.)

**Reader's Digest:**

*Larceny*: The circumstances in which a series of takings amount to one felonious taking for the purposes of larceny are considered in the *Police College Magazine*, Autumn, 1956, at p. 272.

*Road traffic*: The general law relating to the speed limits of motor-vehicles is considered at 100 *Solicitors' Journal* 706.

*Children*: A survey of the law relating to juveniles alleged to be in need of care and protection is included at 120 *Justice of the Peace* 595.

*Magistrates' courts.* When is a court justified in saying that parties have had adequate notice of an adjourned hearing is the question considered at 120 *Justice of the Peace* 580.

*Food and drugs*: The enforcement of the Food Hygiene Regulations, 1955 ([1956] Crim.L.R. 133) is the subject of an article at 120 *Justice of the Peace* 594.

*Police*: The work of the City of London Police in relation to crime prevention is described in the *Police College Magazine*, Autumn, 1956, at p. 210.

*Police*: Some useful information concerning "walkie-talkies" is given in an article in the *Police College Magazine*, Autumn, 1956, at p. 248.

*Police*: Certain points concerning the law which are not always known by police officers are considered in a series of articles in the *Police Review*, September 7, 1956, at p. 636; September 14, at p. 656; September 21, at p. 674, and September 28, at p. 692.

*Police*: The *International Criminal Police Review*, August–September, 1956, contains a detailed report of the proceedings at the General Assembly of the International Criminal Police Commission held at Vienna in June.

*Prisons*: An address given by Sir Lionel Fox, C.B., Chairman of the Prison Commission, at the annual conference of the National Association of Probation Officers, in which he considered our prison system in relation to two criteria, the objectives of the Criminal Justice Act, 1948, and the conclusions of the U.N. Congress at Geneva last year, is printed at 8 *Probation* 33. Two suggestions for reducing the prison population are made at 100 *Solicitors' Journal* 675.

*Forensic science*: In the *Journal of Forensic Medicine*, Vol. 3, No. 3, there are articles on suicidal laryngectomy, blood grouping tests, the electroencephalogram and criminal responsibility, and poisoning by alcohol.

# THE
# CRIMINAL LAW
# REVIEW

*Editors*
JOHN BURKE and PETER ALLSOP, M.A.
*Barristers-at-Law*

## *Editorial*

### Murder

The Government have introduced a Homicide Bill which proposes to restrict the death penalty to five forms of murder and to repeated murder. The five forms of murder are those committed in the course of or in furtherance of theft; those committed in resisting or avoiding arrest or escaping from legal custody; murder of police officers or persons assisting them; murder of prison officers or persons assisting them and murders by shooting or causing explosions. The sentence for other forms of murder will be imprisonment for life.

While one can see the reasons for these classes of " capital murder," two objections may be made. Other offensive weapons such as knives, may be as dangerous as firearms and because of this it is difficult to see why murder by shooting should be differentiated. A carefully premeditated murder by poisoning is regarded by many people as one of the most heinous crimes, yet this is no longer to be subject to the death penalty.

Other changes in the substantive law of murder proposed by the Bill concern the abolition of the doctrine of constructive malice, provocation, suicide pacts, diminished responsibility, and liability to the death penalty where two or more persons are guilty of capital murder. Certain amendments are also proposed in the form of sentence and procedure relating to executions.

This Bill goes a long way to meet some of the objections made by those supporting the abolition of the death penalty. No free vote will be allowed on it in the House of Commons and it is thought in some quarters that the Government will try to push it through as quickly as possible. It has already received an unopposed second reading. Mr. Silverman's Bill proposing total abolition of capital punishment lapsed at the end of the last session. A similar Bill is to be introduced by a private member but although a free vote will be allowed, it is probable that there will not be adequate parliamentary time for its consideration.

### Road Traffic Act, 1956

The Home Office has issued a circular (No. 140/1956, dated September 28, 1956) drawing attention to certain major changes in the law effected by the Road Traffic Act, 1956, particularly those relating to offences and penalties.

The Lord Chancellor has asked the Secretary of State to bring to the attention of magistrates " that one of the main purposes of the Act is the reduction of road accidents. To this end the Act not only increases the penalties for certain offences by drivers of motor-vehicles and penalises dangerous conduct on the part of cyclists and pedestrians, but also introduces certain positive measures . . . to promote safety on the roads. During the debates on the Bill in both Houses of Parliament the view was expressed that the courts could play an important part in reducing the mounting number of casualties on the roads by imposing in proper cases punishments which would adequately impress on motorists the seriousness of offences which imperil the lives of others. Amendments to the Bill were moved to introduce minimum penalties. The Lord Chancellor resisted these amendments on behalf of the Government, but in doing so he emphasised that this might be ' the last chance of voluntary serious consideration of one of the greatest evils of our time.' He suggested that ' magistrates' courts might be well advised to review the scale of the penalties which they customarily impose in motoring cases and decide in the light of the gravity of the problem of road safety and in the fall of the value of money whether these are adequate ' and he emphasised the importance of disqualification, both as a deterrent and as a means of keeping offenders off the road in the interests of public safety."

### Pedestrians

On November 1, when section 14 of the Road Traffic Act, 1956, came into force, it became an offence for pedestrians to disobey traffic directions given by the police. The first prosecutions under this section have already taken place. A fine of £1 was imposed at Hammersmith on a defendant on November 22.[1] At Southend a fine of £3 was imposed.[2]

### Criminal statistics

For the first time since 1951 the annual criminal statistics show an increase in the number of persons found guilty of indictable offences. The Criminal Statistics for England and Wales, 1955 (Cmd. 9884) [7s. net] show an increase of 1 per cent. in the number of such persons as compared with 1954. The number of persons found guilty of non-indictable offences increased by 1·5 per cent., a smaller increase than that of 5·5 per cent. shown by the 1954 statistics. Of the 438,085 indictable offences known to the police, 48·7 per cent. were cleared up; in 1954 the percentage cleared up was 49·2.

### Drunkenness

A Home Office White Paper (Cmd. 9888) [1s. net.] shows that more offences of drunkenness were proved in England and Wales last year than at any time since 1938. They numbered 54,210. In the cities and boroughs the highest figure per 10,000 of the population was in London where it was 276·96; the lowest figure, 2·13, was in Bristol.

### Foreign matters

According to a report in *The Daily Telegraph* of October 15 a new campaign against juvenile crime has been initiated in Russia. In a broadcast, Mr. Boldyrev, Soviet Deputy Prosecutor-General, said that drink was at the root of much juvenile crime: "It all starts with chocolates, then chocolates with rum. This turns into rum with chocolates, and ends with rum neat." Of every 100 thefts among students 80 are committed under the influence of drink. It is causing great alarm that the majority of those arrested for hooliganism are young workers and students. Mr. Boldyrev ended his speech with a denunciation of begging.

### Police Arbitration Tribunal

Sir Albert Day has been appointed as one of the three arbitrators for the Police Council for Great Britain in place of the late Sir Richard Lloyd-Roberts.

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[1] *Evening Standard,* November 22, 1956.

[2] *The Times*, November 21, 1956.

**Parliament**

The Queen opened a new session of Parliament on November 6. Beside the proposals already put forward to amend the law of homicide and to limit the scope of capital punishment (see p. 787) measures are to be introduced to replace the existing emergency powers in respect of hire-purchase and hiring agreements, to amend the law about the closing hours of shops and related matters and to enable increases in the pay and allowances of members of the police to be given retrospective effect.

*Magistrates' courts*

The Home Secretary rejected a proposal that he should introduce legislation to restrict the power of the courts to refuse bail. The grant or refusal of bail seems to him to be a matter on which the courts ought not to be closely fettered by legislation. Asked if he would draw the attention of magistrates to the very serious step they are taking in remanding in custody and depriving of his liberty someone who has not yet been convicted of any offence, Major Lloyd-George replied that two circulars have been issued in recent years to magistrates on this matter, but he will certainly look again into the question (Vol. 558, col. 804 ; October 25, 1956).

A proposal that legislation might be introduced to enable magistrates' courts to try cases of minor housebreaking was not accepted by the Home Secretary. The present list of indictable offences triable summarily is based on the recommendations of a Departmental Committee and a similar review of the whole question would be desirable before any change is made (Vol. 558, col. 1617; November 1, 1956).

*Road traffic*

21,262 holders of driving licences were disqualified during 1954 by the courts in England and Wales. 2,723, just over 12½ per cent., were disqualified following on a conviction for driving or being in charge of a motor-vehicle while under the influence of drink or drugs. 1954 is the latest year for which figures are at present available (Vol. 558, col. *159* ; October 31, 1956). As to disqualification, see the remarks of the Lord Chancellor, [1956] Crim.L.R. 722.

The report of the London Traffic Advisory Committee concerning the prohibition of parking in certain streets should be available shortly (Vol. 558, col. 810 ; October 25, 1956).

*Police*

Directions as to the observance of economy in the use of police transport were given to all members of the Metropolitan police force last April in view of the need for economy in public expenditure. The Commissioner is satisfied that the direction to the officers of the Criminal Investigation Department that they must travel by public transport unless the use of a police car is absolutely essential is in no way harmful to the efficiency of that branch of the force (Vol. 558, col. 813 ; October 25, 1956).

### *Prisons*

The Home Secretary does not consider that at present a committee, representative of both sides of industry, to consider the employment of prisoners, would be helpful. Three steps have been taken towards providing prisoners with sufficient and suitable employment: the Government is trying to get more contracts through the normal channels, several out-factories for the use of local employers have been set up in prisons on the pattern of the Continental system and the trade unions have been approached on a national level with a view to getting their sympathetic co-operation for extra-mural labour in the prisons (Vol. 558, col. 1615 ; November 1, 1956).

The Home Secretary refuses to abolish the censorship of letters sent by prisoners to Members of Parliament (Vol. 558, col. 801 ; October 25, 1956).

### Judicial appointment

Mr. N. M. G. Faulks has been appointed Recorder of the Borough of Deal.

### Corrigendum

Page 676, paragraph numbered 2, line 2, should read " of disqualification before the expiry of the full period. No applica-."

### Police Regulations

*Philadelphia policemen have been warned by their Commissioner not to wear blue suede shoes, bright socks or fancy tie clasps on duty. They must always carry a coin for a telephone call and an extra white handkerchief for emergency first aid. Shopping on the way home is banned :* The Daily Telegraph, *October* 9, 1956.

*Subscribers and others are invited to submit for publication articles and letters on matters of interest within the scope of this Review. They should be sent to the* EDITOR, *Criminal Law Review,* 3 CHANCERY LANE, LONDON, W.C.2. *Every effort will be made to return drafts or unsuitable copy, but no guarantee can be given in this respect.*

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# *What's in a Name?*

## The Problem of the Definition of Crime

By SETON POLLOCK, *Solicitor*

According to a correspondent to *The Times*[1] fried fillets of dab are indistinguishable from fried fillets of plaice except by microscopic examination, and so it came about that a well-known London restaurant was fined for serving its customers with fish under the wrong name, though the error had occurred through the supply being wrongly invoiced by the wholesaler and without any intention to deceive on the part of the *restaurateur*. But for the assiduity of inspectors equipped with microscopes the customers might well have continued to enjoy their plates of dab believing that they were eating the somewhat less *recherché* plaice.

It seemed odd to this correspondent that public money should have been expended upon such a prosecution, though others did not agree with him; but he might have regarded it as even more odd that this offence, committed in innocence, should rank at law as a crime in common with murder, arson, and rape. We may well ask, whether we be caterers or lawyers, "What's in a name?" The answer, so far as crime is concerned, is of rather greater importance than might be supposed, for linguistic confusions are not without their dangers, and it cannot be a matter of unconcern that so fundamental a word as "crime" means one thing to the lawyer and quite another to the ordinary lawful man. To make statutory criminals of us all, after the modern fashion, is to debase a powerful concept that underpins society and to run the risk of confusing the moral sense of the community.

### *Previous definitions*

The root of this unfortunate situation is to be found in the fact that no really satisfactory definition of crime has yet been evolved. Those of us who were brought up on Kenny's *Outlines of Criminal Law* will remember our surprise at learning how difficult it is to define a crime and how inadequate all the more obvious tests turn out to be when subjected to analysis. We remember also the sense of misgiving we experienced when, after the best part of a chapter of acute discussion, we were invited to believe that a crime was a wrong the sanction for which was remissible by the Crown. It was some slight relief when the author allowed us to eke out this curious definition by a passing glance at the, normally, punitive character of the sanction. In the years that followed our misgiving was proved to be justified, for it was pointed out that, if the power of remission were removed by statute, it would have the astonishing effect of doing away with crime altogether—a prospect so absurd that the definition could not survive. Moreover, the growing tendency to replace bare punishment by forms of treatment aimed at helping to reform the criminal reduced the already dubious value of the subsidiary mark of distinction to vanishing point. So it came about that in the later editions of this famous work, Kenny's well-known first chapter was relegated to an appendix, its place in the text being taken by a brief paragraph dismissing the matter as not worth further discussion.

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[1] See *The Times*, April 6, 1956, and subsequent letters.

The debate is not yet over, however. Only last year Dr. Glanville Williams, in a paper published in *Current Legal Problems 1955*,[2] returned to the attack. Having dismissed the still canvassed notion that crime can be identified by something inherent in the wrongful act itself, he accepted Kenny's main point that the legal definition is found in the procedure by which the act is dealt with, urging, however, that we must not look to some supposedly decisive single point but to the procedure as a whole to discern whether on balance the wrong falls on one side of the line or the other. Thus, a crime can be defined simply as a wrong that society has decided to treat as a crime. Whether it has so decided must be ascertained by looking at the procedure it adopts in the round. One might have thought that this was the last word on the subject, but there is one factor that has consistently been overlooked which the present writer believes is valuable, not only in clearing up a long-standing legal conundrum but in offering a powerful instrument for restoring the term " crime " to its proper force at law.

### *The object of criminal procedure*

We can best approach the matter by noticing that in any procedural process there is a point at which it ceases to be " mere procedure " and becomes the substance of the matter. Thus, in the process of a hanging there are doubtless many procedural steps, but it is in the fixing of the rope and the release of the trap that the crux is found, and at this point the procedure becomes substantial.

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[2] See also *Current Legal Problems, 1956*, in which Dr. Williams consolidates and extends his attack.

The other steps may be highly important but they hinge upon the effective point at which the intended thing is done. Most of the steps may be varied within wide limits, but the crucial ones cannot be varied without defeating the total intention. Applying this insight to criminal procedure, we begin by asking what exactly it is intended to achieve, and at once the crux is located. The object of criminal procedure is to ensure that what society believes ought to be done on proof of certain wrongs is in fact done. It is not the central purpose of the procedure to bring suspected persons to trial, nor yet to establish guilt, nor yet to make pious declarations as to what ought to be done. All these steps are important enough, but they take their vitality from the execution of the sentence. Cut out that step and the rest collapse: introduce it, and the others follow inevitably. It is, thus, to the stage of execution that we should look for the mark of distinction, if such a mark exists at all, between the procedure in crime and that in tort. Once the critical point is isolated in this decisive way we cannot fail to note that there is in fact a radical difference between execution in the two spheres. In crime, there is no ancillary process that must be invoked to precipitate the execution of the judgment of the court: execution is automatic, subject only to the right of the Crown to remit. In tort, execution only follows the judgment if some party moves the court to execution by judgment summons, writ of fi. fa., elegit, or some other such process. Nor is this difference accidental, for it expresses exactly what society feels about the two groups of wrong. There are wrongs in respect of which the community agrees to assume full responsibility for doing what ought to be done, brooking no interference. There are others in which it is content to lend its procedural resources to the citizen so that he can, if he wishes, ensure that what may lawfully be done is in fact done. The former convention, which comprises the criminal law, is a system of self-help on the part of the State itself: the latter convention, which is civil, is a system of State-aided self-help provided for the citizen. The difference is logical and completely acceptable to the reasonable man, and it is found inevitably in any reasonably developed legal system. It is manifested with utmost clarity in the difference in the forms of procedure that have been evolved in the two separate spheres.

This is not the place to analyse all the anomalous cases that have been discussed in connection with other definitions of crime; it must suffice to submit that there are no exceptions to the principle now proposed and to mention only one or two of the supposed anomalies by way of example. The common informer, now happily extinct, was thought to present insuperable difficulties. His civil action was punitive in character and bore some of the marks of the criminal procedure; but in the end he had to move the court to execution if he wished to enforce the penalty, and this single factor marks the whole process as civil. Again, the civil rights of the Crown are often enforced, for convenience, in criminal courts under the procedure appropriate to such courts; but the Crown must apply to the court to enforce the penalty or award if it goes unmet. The civil character of the wrong is thus clearly established. In contempt of court, the test neatly draws the line between those contempts that are criminal and those that are civil. Where the order of the court in respect of them is put into execution without further ado we are in the realm of crime: where a party must move the court to the execution of its own order we are in the civil realm. In the case of contempt in face of the court, where procedural steps are conspicuous by their absence, the contempt is none the less marked plainly as criminal because the judge's order is carried into effect without any further application being required for its implementation.

It is significant that Kenny's insight led him directly to this same point in the procedure for his distinguishing test. What is astonishing is that he fastened, not upon what is normally done, but upon the quite accidental factor of remission of penalty which occurs only when there is the danger of a miscarriage of justice or the need for mercy. The weakness of his definition is best shown by observing that the intention of criminal procedure is not to let the wrongdoer off (though this may occasionally be done) but to deal with him in accordance with the law. This curious deflection of attention from the essential point to a purely subsidiary factor bemused not only Kenny, but Austin before him and many who followed in their steps.

### *Application of test*

The fundamental nature of the test now proposed may be demonstrated by observing what would happen in two extreme cases if the mode of execution were to be altered by statute. If, for example, a murderer were free to leave the court following sentence if the next-of-kin failed to move the court to execution, and the next-of-kin were left with the right to refrain from making any such application, murder would lose its criminal character and would revert to being a wrong between neighbours such as it was before the establishment of the Queen's Peace. Conversely, if damages for negligence in a running-down action were to be recovered automatically at the instance of the court, leaving the plaintiff no power of remission, such negligence would be marked as criminal, notwithstanding the otherwise civil character of the procedure used and even if the whole of the damages, when recovered, were paid to the wronged party.

At first sight it would seem that the argument now advanced is in flat contradiction to Dr. Glanville Williams's view which, it will be remembered, required us not to search for any single mark of distinction but to look at the procedure as a whole. There is, however, no such contradiction. If we define a crime as *a wrong the sanction for which is executed by officers of the Crown without their being moved thereto or being liable to deflection therefrom by any party other than the Crown,* we might imagine that we have established a simple and unfailing test. But, when we ask what kind of wrong is to be dealt with on this principle, the only answer we can give is " crimes," and we find ourselves caught in a circularity. It would be otherwise if the mode of execution were to be laid down in every case, for then we should know at a glance what wrongs were crimes. To ask whether a wrong is a crime is to ask at the same time whether it is a wrong in respect of which the community has assumed full responsibility for seeing to the execution of the judgment it approves. This double-barrelled question can be answered only by looking at the total procedure the community has adopted through its legal system, and it is by looking at it as a whole that we reach a decision as to the appropriate mode of execution.

### *Value of the definition*

What, then, is the value of the definition? In the first place it enables us to know what we are really trying to decide. To distinguish a needle from a pin it is useful to bear firmly in mind the function of each so that we shall not waste time debating whether a headless pin could be classified as a needle; we shall look at once to see whether it is intended to be threaded. Again, the definition suggests a means by which " administrative wrongs " (*e.g.*, parking offences) can be removed from the sphere of crime. All that is needed is to change the method of execution, relieving the court of the primary duty of seeing to execution and laying that duty upon the prosecuting body, requiring it to make application to the court to implement its own judgment if the wrongdoer failed to comply with it. No additional work would result from such a change for the onus of seeing to execution must be accepted by someone and it is a mere administrative detail whether the person responsible is a clerk in the court or a police officer or a ministry official. Application for execution could normally be made verbally immediately following the decision, leaving it to the defendant to ask for time to pay, if required, in the same way as prevails at present. Yet this apparently minor variation in procedure would decisively remove such wrongs from the realm of crime to the realm of civil wrong.

Finally, the definition opens up a means for putting the classification of legal wrongs on a rational basis. Such wrongs fall into four broad classes. There are wrongs that strike at the foundations of any form of human society that is worthy of the name—those gross appeals to force and cunning whereby unlawful men serve their own interests at the peril of the whole social fabric upon which those very interests depend in the last resort. There are other wrongs that do not directly threaten the basic principle of human community but which so seriously imperil the kind of civilisation that its members regard as essential that they deem it to be necessary to organise and control the means of checking those wrongs. These two groups together cover the field of crime properly so called. There is a third group which, if not methodically checked by some body appointed to undertake the task, would be injurious to the smooth and efficient administration of an advanced style of society ; and these are the wrongs that, for reasons of mere administrative convenience, have almost inadvertently been admitted into the realm of crime. They could, and should, be removed therefrom by the simple device suggested. The fourth group comprises those wrongs that the community is content to leave to the citizen to deal with through the lawful facilities it provides in its courts, and these constitute the territory of tort. Into which of the groups any particular wrong will fall at any stage in the history of a society will depend upon the dominant attitude to that wrong at the time in question, save that, through sheer inertia, wrongs may be left for long periods in a group which has ceased to be appropriate.

A classification upon some such basis would rationalise an area of our law that has fallen into serious confusion and, armed with a precise definition of crime such as is here suggested, the task of clarification would be comparatively simple. But what matters most is that by adopting the remedy proposed the word "crime" as used by lawyers would recover its moral force by answering faithfully to the conscience of society—a matter of no small moment at the present juncture of our social evolution.

# The Criminal Law and the Woman Seducer—The Sexual Offences Act, 1956

By A. N. Mackesy, ll.b.

In the article "The Criminal Law and the Woman Seducer" ([1956] Crim.L.R. 446–456, 529–542) the writer discussed the effect of section 1 of the Criminal Law Amendment Act, 1922, which provides:—

> "It shall be no defence to a charge or indictment for an indecent assault on a child or young person under the age of sixteen to prove that he or she consented to the act of indecency."

It was observed (p. 540) that this section provides not that it is no defence to prove that the person under sixteen "consented" but that it is no defence to prove that he or she "consented to the act of indecency." The possibility was considered that, although (according to the wording of this section) it is no defence that the person under sixteen consented to the "act of indecency," it might nevertheless be a defence that he or she consented to the alleged assault ("for 'the question of consent is material not on the issue of indecency but on the fundamental question of an assault'") and that therefore this section applied only where the alleged assault is also in itself an act of indecency and did not apply where the alleged assault is decent in itself but accompanied by an act of indecency as in *Beal* v. *Kelley* (1951) 35 Cr.App.R. 128, so that "non-indecent" handling of a consenting child in circumstances of indecency could never amount to an indecent assault.

The possibility was considered that the wording of this section might explain the decision in *D. P. P.* v. *Rogers* (1953) 37 Cr.App. R. 137, a case where Lord Goddard C.J. reluctantly upholding a decision by justices dismissing a charge of indecent assault upon a girl aged eleven said (p. 140): "It is quite true that there might be a case in which the evidence showed that what was being done was really done against the will of the child," and which Herron J. in the New South Wales Court of Criminal Appeal regarded as an authority for the proposition that "In England," on a charge of indecent assault on a person under sixteen, ". . . there must be an assault in the strict sense, in some hostile manner or with compulsion in some degree, before the offence can be committed" (*B. and L.* (1954) 71 W.N.(N.S.W.) 138, 140).

It is noteworthy that the section in question (which replaced a similar provision in the Criminal Law Amendment Act, 1880, under which the age was thirteen) has now been repealed by the Sexual Offences Act, 1956, which (by section 56) comes into force on January 1, 1957. Section 15 of the new Act provides:—

> "(1) It is an offence for a person to make an indecent assault on a man.[1]
>
> (2) A boy under the age of sixteen cannot in law give any consent which would prevent an act being an assault for the purposes of this section."

Section 14 makes similar provisions concerning indecent assaults on women and girls.

# A New Zealand Letter

Wellington,
*July*, 1956.

## The Death Penalty

While Mr. Sidney Silverman was carrying the House of Commons with him in the move to abolish capital punishment Mr. W. T. Anderton, an Opposition Member of the New Zealand Parliament, has been renewing his efforts in a similar direction. This year he again introduced a private Bill aimed at abolishing the death penalty for murder. The Bill led to a debate in which the conflicting views on this issue were voiced at length, but Mr. Anderton did not succeed in having his Bill carried. Instead, Parliament decided that the question be made the subject of a referendum at the time of the next general election (in 1957).

In the course of the debate the arguments that have so often been adduced on both sides were all heard again, with little that was new. The material contained in the report of the recent Royal Commission in England was used, but those favouring the retention of capital punishment discounted this evidence on the ground that the Commission was not charged with making any recommendation on the question of abolition. Nearly all members of the Government were opposed to abolition. The Minister of Justice proffered six reasons why it should be retained as the punishment for the worst cases of murder. Among them he included " a belief in the infinite worth of human life "—a reason which was also adduced, somewhat less paradoxically, by those in favour of abolition.

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[1] "Man" includes "boy" (s. 46).

The decision to submit the issue to a referendum was by no means universally approved. The editor of the principal Wellington newspaper wrote:

> " Whether capital punishment should be retained or not is a serious issue and should be decided only after thorough and dispassionate consideration. The member who introduced the Crimes Amendment Bill, Mr. Anderton, said last evening—before the Prime Minister gave notice of his amendment—that he knew of no better tribunal to give the question this thorough and dispassionate consideration than the Parliamentary representatives of the people. We think Mr. Anderton is right."

The Opposition attempted unsuccessfully to have the referendum fixed for a date other than that of the general election. The issue will accordingly come before the people linked with the main questions of party politics.

Though this aspect of the decision is to be regretted it must not be forgotten that in a democracy legislative policy must always depend basically on the will of the people. In the long run, improvements in criminal law are more certain and more lasting if reform does not outpace popular feeling. There is as yet no evidence in New Zealand that the case for abolition has been generally accepted. That capital punishment has great practical value as a deterrent is virtually devoid of proof, but it is a belief that is still very widely held. It would not be surprising if the point of view which prevails in the referendum is that, when dealing with murderers, hanging is too good for them.

## Equality before the Law

A bank manager, fifty-one years of age, took part in the jubilee celebrations of the school he had attended as a boy. He drove home erratically, and was later charged with driving a motor-vehicle while under the influence of drink. He pleaded guilty, and counsel on his behalf asked the court to take into consideration his otherwise unblemished character, his thirty-five years of faithful service to the bank, and the family from which he came.

The magistrate: Yes, but the majority of offenders in these cases are of good character. The court cannot be expected to dispense justice on a scale of social distinction. Criticism is levelled at the slightest difference in sentences, and the social standing of an offender is irrelevant to the impartial administration of the law.

### Publicity before Trial

In New Zealand it is still permissible to publish in the press the evidence given at the preliminary inquiry into an indictable offence before the defendant is committed to the Supreme Court for trial. It is also permissible to publish the remarks made by the Supreme Court judge when addressing the Grand Jury to which bills of indictment are to be presented. These newspaper accounts may have been read by those who become the common jurors. Can this affect their impartiality?

In *R.* v. *Black* [1956] N.Z.L.R. 204 the accused was charged with murder. The newspapers published the judge's charge to the Grand Jury, in the course of which his Honour said:

> " In this country which prides itself on its standard of citizenship there has developed in recent years an attitude towards human life which to say the least is deeply reprehensible. In this case the offender is not of ours, except by adoption, and apparently comes from a type which we could well have spared our country. He belongs to a peculiar sect, if you could call it that, or a peculiar association of individuals whose outlook on life differs from the normal. It is unfortunate that we got him from his home land. It is a case of apparently deliberate stabbing in a restaurant in Upper Queen Street. There seems to be no opening of either provocation or self-defence, or any of the defences usually presented in a case of this kind."

This insular and prejudicial utterance was printed in newspapers delivered to each juryman's room at the hotel at which they stayed during the trial. The defences actually raised were that the blow was struck in self-defence or alternatively that there was sufficient provocation to reduce the crime to manslaughter. After the accused had been convicted of murder he appealed on the ground that the statements which came to the knowledge of the common jury were of such a character as adversely to influence them in their consideration of the case.

The Court of Appeal held that the newspaper report did contain material of a prejudicial nature, but added that it had always been the practice in this country for the charge to the Grand Jury to be reported in the newspapers. Whether this was thought to justify the practice is not clear. At all events the court went on to stress portions of the trial judge's summing-up, in which he took pains to impress upon the jury that they must forget all they had read or heard about the case. " Gentlemen," he said, " when you come to sit in the high seat of judgment, when the doing of justice is committed to your hands, then all those things must be forgotten and you must base your judgment solely on the evidence that has been given before you and on the justified conclusions that you draw from that evidence."

In these circumstances, and in the belief that jurors, unlike other men, can at the word of command forget what they have been told, the Court of Appeal concluded that the jury, even if they originally were prejudiced against the appellant, did not allow that prejudice to enter into their deliberations.

The court supported its decision with the observation that the common jury panel had been excluded from the court during the delivery of the charge to the Grand Jury. In view of the court's decision one might ask whether this practice has not outlived its usefulness.

### Should Punishment Fit the Crime?

Addressing a meeting of the Justices of the Peace Association the Attorney-General said he was continually receiving letters asking why it was that one person should be imprisoned and another fined for the same offence. " It troubles the man in the street and more particularly the man in the dock," he said. They were puzzled why the punishment should not be the same in both cases. The problem of the uniformity of penalties deeply concerned all those responsible for the administration of justice. Parliament fixed the maximum penalties in various statutes, and they were usually adequate for the worst cases of any particular offence. But it was solely a matter for the courts to determine, after considering all the aspects of the case, what was the adequate punishment. The foremost safeguard against lack of uniformity in penalties in summary cases was the right of appeal to the Supreme Court.

So long as the man in the street continues to approve the " object all sublime " attributed to the Mikado he will continue to be puzzled by the ways of the courts. To make the punishment fit the crime is only half, perhaps less than half, of the task of sentencing. On conviction for a major offence, where a readjustment of the offender's behaviour and attitudes must if possible be secured by the sentence, the gravity of the crime gives little guide as to the measures most likely to turn the offender from his path.

### Child Delinquency

This topic continues to be in the forefront of public attention, and there is now a steady onslaught on the delinquent's parents who are held in the main to be responsible. Whether public criticism can ever do much in this field seems extremely doubtful, but for what it is worth the New Zealand citizen is being given repeated exhortations to mend his ways. A prison chaplain says that there would be less juvenile delinquency if more fathers would shake the dust from their old tennis rackets and spend more time with their sons. Other suggested remedies have been the "birching of bodgies" (proposed in Australia), more youth clubs, and provision of club huts for the young motor-cyclists who gain notoriety as "milk-bar cowboys." But a Q.C. thinks that these proposals are superficial. "It is desirable to say plainly," he says, "that neither heavy punishment nor the promise of a hut will be any more useful in the present situation than the smacking of a troublesome baby. Juvenile delinquency has to be recognised for what it really is—a revolt, often a blind and instinctive revolt, against any attempt to impose upon young people standards which adults are not prepared to accept for themselves." Maintaining that bleak homes and working mothers were among the most potent causes of child delinquency he said: "Any father who lets his wife go out working for a refrigerator need not be at all surprised if his own son ends up in the 'cooler.'"

### Clinching the Alibi

In a murder case witnesses gave evidence of having seen the accused at the village where the crime was committed, and described the clothes he was wearing. According to the press report of the trial the accused, who denied having been at that village, countered the evidence of the witnesses with this remarkable statement: "I was not dressed in the clothes that certain people have sworn that I wore because I do not know those people."

### The Prisoner Returns

However grave the crime and however vicious the criminal, the time eventually comes when the man in prison serving a long sentence returns to civil life. It is as important for the protection of the community as for the reform of the prisoner that he should be returned to society as well prepared as possible to lead a normal law-abiding life. To this end, it has been a part of penal policy for some years to take steps, when the date for release is approaching, to help bridge the gap between prison life and the life of free men. This involves allowing prisoners to be outside the prison taking part in the activities of ordinary citizens.

This policy received a violent shaking last December. A group of long-term prisoners from a maximum-security prison was taken, under the supervision of warders, to compete with a bowling team at a nearby rink. One of the men, with a conviction for a particularly revolting crime, seized the opportunity to escape. Widespread alarm was caused, especially among women in the locality, until he was recaptured.

The policy of the Prisons Department was subsequently brought under critical review. As a result the conditions of temporary release have been considerably tightened. But the Government has not been stampeded into abandoning the sensible policy of preparing prisoners for their eventual discharge. The Attorney-General has reaffirmed the aim of securing better protection for the public by cautious use of recreational and other privileges before final release.

### Borstal Vindicated

A Conservative Member of Parliament was wearing a bright red tie at a political gathering. There was a troublesome heckler who at one stage called out: " Why are you wearing that Labour tie? " To this the speaker retorted: " That's not a Labour tie, that's Borstal Old Boys, you should know that." This quietened the heckler, but after the meeting two elderly ladies approached the speaker. " We have been great supporters of the Howard League," they said. " It's so very nice to see one of our people make good."

I. D. CAMPBELL.

# *Submission of " No Case " in Magistrates' Courts*

By A. J. CHISLETT, *Clerk to the Justices*

In his letter [1956] Crim.L.R. 714, Mr. Joseph Yahuda rightly observes that the cases cited in Stone's *Justices' Manual*, 88th ed., at p. 238 on the question of election to rest a case upon a submission of no case or to call evidence are all civil cases, and he comments that the procedure is not intended for the criminal side of our jurisdiction. That this is so will be agreed by everybody, but it is of interest to consider why this distinction between civil and criminal trial exists.

The history of the procedure is found in *Parry* v. *Aluminium Corporation, Ltd.* (1940) 56 T.L.R. 318, where Goddard L.J. said: " If a judge is asked to rule at the end of the plaintiff's case that the plaintiff has made out no case, it is most desirable that he should adopt the practice, laid down a great many years ago in this court, when Lord Justice Mathew was sitting here, and since adopted by Mr. Justice Horridge, who was a judge of the greatest experience in these matters, that the judge should say to counsel who is submitting no case ' Do you elect to call no evidence? ' If counsel is content to leave the case where it is, then the judge can rule. But it is very undesirable for the judge to give a ruling in a case which may afterwards be upset by the Court of Appeal, when the defendant may be in a position to say ' I must have a new trial, because my evidence was never heard.' I think that the right course is for the judge to refuse to rule unless counsel says that he is going to call no evidence. . . . I think that the old practice which I believe most judges adopted is the sound practice, because it does prevent the chance of a defendant, unsuccessful in this court, asking that the case should go back for a new trial to have his evidence heard."

In a non-jury case the reason for counsel being put to his election was given in the case of *Alexander* v. *Rayson* [1936] 1 K.B. 169 at 178—" The judge . . . is also the judge of fact, and we cannot think it right that the judge of fact should be asked to express any opinion upon the evidence until the evidence is completed."

*Parry* v. *Aluminium Corporation* was followed in *Laurie* v. *Raglan Building Co., Ltd.* [1942] 1 K.B. 152. That the rule is not inflexible was shown by the case of *Muller & Co.'s Algemeene, etc.* v. *Ebbw Vale Steel Co., Ltd.* (1936) 52 T.L.R. 655, where Branson J. said that it was a matter of convenience, and the judge must apply his mind to the interests of the parties.

In 1945 the rule was extended to the Divorce Court and in *Yuill* v. *Yuill* [1945] P. 15, the Master of the Rolls " assumed " that the practice of calling on counsel to elect was " a proper practice to follow in the Divorce Division." He added that counsel, by submitting no case, does not *ipso facto* lose his right to call evidence if his submission fails; he only loses that right if he definitely elects to call no evidence.

So much for the application of the rule in the High Court.

Where magistrates' courts are concerned, the rule first achieves notice in an appeal to the Divorce Court in a domestic proceeding, and in *Goodwin* v. *Goodwin* [1947] W.N. 28, the President, referring to the extension of the rule to the Divorce Court acknowledged in *Yuill* v. *Yuill* (*supra*), quoted from the headnote " at the close of the petitioner's case counsel for the respondent submits that there is no case, it is for the judge to put counsel to his election whether he will call evidence, and it is only if counsel elects not to do so that the judge must decide whether or not the petitioner has established his case."

Any doubts that the procedure may not be applicable to magistrates' courts were resolved by the President in *Baverstock* v. *Baverstock* [1951] W.N. 104, where he said, " It is perfectly plain that the advocate who makes such a submission (that in law there is no case to answer, a pure submission of law that on this evidence it was not open to the justices in any event to find the charge proved) should be called upon to state whether he elects to stand upon that submission without calling evidence or whether he intends to call evidence. No such point was put and it is only right and fair to the justices to say that the husband's representative did not remind them that that was *their duty*."

The *ratio decidendi* of this ruling is clearly the same as that of *Alexander* v. *Rayson* (*supra*)—the magistrates are the judges of fact as well as law and should not be asked to express any opinion upon the evidence until the evidence is completed. The reasoning followed in *Parry's* case, namely, that the rule prevented an unsuccessful defendant from asking for a new trial to have his evidence heard, is hardly applicable to magistrates' courts.

Against this it has been argued that in magistrates' courts procedure in civil cases is controlled exclusively by the provisions of section 45 of the Magistrates' Courts Act, 1952, and rule 18 of the Magistrates' Courts Rules, 1952. It is true that these do not deal with the procedure to be followed on a submission of " no case," but where such a submission is made it is obvious that the direction of the President must be accepted as supplementing the existing provisions. A plain direction that it is the duty of the justices to follow a certain course cannot be ignored.

The foregoing decisions were all in respect of civil cases, and no decision of the High Court has ever required the described procedure to be applied to criminal cases, either in trials on indictment or otherwise. Indeed, it is certain that any attempt to apply it would be regarded as improper. Roscoe's *Criminal Evidence*, (16th ed.) in a section on " No case " at p. 275 does not discuss the point, neither does Archbold at p. 346. The reasons are, of course, obvious. In a criminal trial on indictment not only is the jury the judge of fact, but never in any circumstances could an accused person's defence be suppressed. Similarly, in a magistrates' court, although the justices judge both fact and law, the defendant is entitled to put forward his case. Criminal procedure in a magistrates' court must follow the directions contained (*inter alia*) in section 13 of the Magistrates' Courts Act, 1952, rule 17 of the Magistrates' Courts Rules, 1952, and the Criminal Evidence Act, 1898, and a submission at the conclusion of the evidence adduced by the prosecution that there was no case to answer (either in fact or in law) cannot prejudice the right of the accused person to give evidence and call witnesses. Any ruling which stifled the evidence for the defence would be certain to receive heavy condemnation from the High Court.

# *The Letter Books of the Thames Police Office*

By STANLEY FRENCH, M.A.

The earlier letters included in the five letter books belonging to the Thames court in Stepney [1] contain few statistics, but towards the end several tables of the number of cases dealt with appear. In the twelve months ending June, 1837, for example, Thames committed 219 people charged with felony for trial and discharged 385 (a surprisingly high proportion of failures on the part of the prosecution); in the same year 709 were convicted of misdemeanour (mainly unlawful possession), and 194 discharged.

There is a more detailed table for 1839 which shows that the Thames magistrates heard a total of 1,160 charges of crime, made up as follows:

> Felonies 177, misdemeanours 3, assault 144, vagrancy 254, default payment penalties 92, riots and breaches of the peace 68, assaults on peace officers 52, drunkards riotous and indecent 68, unlawful possession punishable as misdemeanours 255, offences against local Acts 10, offences against Poor Law 29, offences by servants and apprentices 7, dog stealing 1.

This total is about a quarter of the charges heard yearly by the Thames magistrates now, but the population of the district was only 26,394 in 1837 as against about 200,000 at present, so that the proportion of criminals amongst the inhabitants, permanent and temporary, of the East End in those days was very high.

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[1] See also [1956] Crim.L.R. 680.

The Thames Police Office did not, of course, have to deal every year with some 6,000 summonses, principally for motoring offences, as its successor does. A few offences were dealt with by summons, but they appear to have given the magistrates little trouble. In the seven years prior to May, 1813, not a single information was laid against bakers for selling bread adulterated or under weight, although at the time the magistrates were expressing their satisfaction at this to the Secretary of State they received information that a quantity of alum (used for adulteration) might be found at a baker's in the Ratcliffe Highway. Before the end of the year, however, this splendid record had gone. On December 11, 1813, "3 half pecks, 72 Quarterns, 19 Half Quarterns, 11 threepenny, 34 twopenny and 16 one penny loaves of bread" which had been seized and brought before the magistrates as deficient in weight were ordered to be conveyed to the Refuge for the Destitute in Hackney Road, of which the Rev. Robert Crosby, M.A., was secretary, for the use of that institution. Four days later the Refuge received a somewhat smaller quantity, confiscated upon the conviction of a baker for possessing underweight loaves, and thereafter from time to time it received a number of welcome gifts of this kind.

From 1831 to 1833 six publicans and four beer-house keepers were convicted of permitting disorderly conduct in their premises or of keeping open at unlawful hours. In 1833 there were eight charges of disorderly conduct against drivers of public omnibuses and cabriolets, but in 1836 there were only three such complaints and one conviction (the fine was £2). There are no figures for other offences dealt with by summons.

The absence of statistics in the earlier books was not due to any lack of interest on the part of the Secretary of State. On the contrary, he kept a very close eye on the work of the Thames Police Office, and to begin with, required all the magistrates to see him together personally once a month, at the same time as he saw the magistrates from the seven "land" police offices. They, no doubt, found this a great nuisance and sought some modification of it. In October, 1808, they wrote to the Secretary of State (then Lord Spencer): "We are sorry to understand that your Lordship enquired for the magistrates of this office this morning when the magistrates of the other offices attended your Lordship. We should certainly have waited on your Lordship but as you were pleased to say that you would receive the reports from this office quarterly and as only two months have elapsed since our last report we conceived it was your Lordship's pleasure to have the report next month." It was not his Lordship's pleasure, and he told the magistrates to come to the Home Office the following Thursday with a monthly report. They stuck to their guns and wrote to the Under Secretary of State to inquire if this order meant that the Minister was going back on his letter of May 2, 1808, consenting to a quarterly return. The upshot was a compromise which must have pleased the magistrates. Instead of their presenting the returns themselves it was agreed that the chief clerk should do so, not monthly or quarterly but every alternate month, when he was always to see the Under Secretary of State with a return of all the offences which had been reported to the magistrates as well as those for which persons had been arrested. The purpose of this personal contact was to enable the Under Secretary to make sure that the returns of all the offices "correspond in form." This change from a monthly meeting of Secretary of State and magistrates may have been due to the change in the holder of the former office, Lord Spencer having given way to Lord Hawkesbury. How long the new arrangement continued does not appear, as it is not until the very end of the period that the annual returns were copied into the letter book, by which time they were apparently no longer taken to the Home Office by the chief clerk.

Few weeks passed, however, without the magistrates receiving a reminder that the Secretary of State was taking an active interest in everything they did. The use he made of them and their men at times of public disturbance has already been mentioned. He also sent them instructions about other matters. In 1808, for example, he directed them to discontinue proceedings against a ship's captain named Tobias, who was charged with the illicit conveyance of letters (presumably between France and England) as the steps which had already been taken were sufficient to deter others, and in March, 1809, he instructed them to inquire into an allegation, made by a Mr. Mills in a letter to the Home Office, that two American captains were enticing people out of the country. (Nothing more came out of this inquiry than that Mr. Mills had repeated a rumour without knowing a single fact to support it.) In 1813 the Secretary of State required the magistrates to inquire into the truth of a report in the *Star* newspaper that there was an outbreak of plague in Wapping, and eighteen years later he gave them instructions on the steps they must take to secure the proper carrying out of precautions against the outbreak of cholera.

### *Magisterial duties*

The magistrates did not object to being asked to do things which might appear to be outside their police and judicial duties; on the contrary, they sometimes undertook such tasks of their own volition, as when they sent their chief officer to inspect a ship moored near the Thames Office for the reception of Scottish and Irish paupers awaiting return to their own country. This report makes distressing reading:

> "I went on board the pauper ship and found there 37 Irish and 3 Scottish paupers, men, women and children. In answer to questions I put to the person in charge of them I was informed that they were allowed either 1 lb. of bread and 4 ozs. cheese, or if they liked it better one salt herring with 1 lb. potatoes or 2 lbs. of potatoes without a herring per day. The sleeping berths are open and built on each side of the hold of the vessel and have no partition whatever to separate the men from the women. They are supplied with fresh straw every time the paupers are removed and have no covering except their clothes. A fire in a close stove [it was February] is placed amidships and a lamp at one end is burned all night . . . some of them have been on board for fourteen days and had not been supplied with fresh straw during that time."

A large number of letters passed between the Secretary of State and the magistrates about the finances of the institution. Although from the first a Receiver (for the first eighteen years the famous Patrick Colquohun) had been appointed to receive all sums collected in fines and fees, and to pay administrative expenses and salaries, the approval of the Secretary of State had to be obtained for any special expenditure, such as repairs to the building at 259 Wapping New Stairs, the acquisition of new vessels for police use, and increases in salaries.

### *The court-house*

This approval was always given or refused in the name of the Secretary of State so that the modern reader, recalling his undergraduate studies of the policies of those Olympians, the Victorian Prime Ministers, gets something of a shock to find that austere Whig, Lord John Russell, consenting to the repair of an office chimney at a cost of £13 15s. 1d., and Queen Victoria's "dear Lord Melbourne" wanting to know why £25 1s. 3d. had been expended on plumbing repairs instead of the original estimate of £8 5s. 4d. To that question the answer was that "This office is supplied with water not by a water company but immediately from the Thames by means of a pump with a pipe leading into a cistern at the top of the house. The pipes are generally injured by frost but are usually repaired for less than £5, but this winter they froze twice and some had to taken out and repaired. Also the top of the Kitchen chimney was blown down by the wind." In 1834, when that was written, the Thames was not so oily and muddy as it is today, but the great traffic up and down it, and the sewage and rubbish which were thrown into it, can hardly have left it potable by modern standards.

The plumbing was not the only unsatisfactory feature of the first Thames court. The building was a private house when it was acquired on lease from the Governors of Bridewell Hospital in 1798, and the staff must have suffered the sort of inconvenience which the staff of another metropolitan magistrates' court, also temporarily accommodated in a private house, have experienced since 1939. For instance, when Mr. W. Ballantine became the resident magistrate in 1833 he found that the room which was intended for a library could not be used for its purpose because it was separated from one of the outer rooms by a partition so thin that it was not " sufficient to intercept the noise and disagreeable language constantly coming " from the public room. He therefore had a small room upstairs " which had not recently been painted or papered " turned into a library and was rapped over the knuckles by Lord John Russell for not applying in writing for permission to do so, instead of relying on something he thought the Under Secretary of State had said in conversation.

If accommodation for the magistrates was poor, that for prisoners was much worse. For men it was a room 8 feet 2 inches wide, 9 feet long and 8 feet high, for women one 4 feet 8 inches wide, 10 feet 4 inches long and 12 feet high. " The former has an iron grating for the admission of external air but being next to a privy and in a very small enclosed yard the air is impure; the latter is merely a part of a room from which alone is received light and air." Both were, as the magistrates told the Secretary of State in 1835, " from their size and situation unwholesome and unfit for their purpose," but nothing appears to have been done about them during the period covered by the letter books.

There was a large and well ventilated lock-up on the *Port Mahon,* a vessel belonging to the Thames Police, at this time moored near Somerset House, but it was rarely used, no doubt because it was so far from headquarters.

In August, 1835, the premises at 259 Wapping New Stairs were due for repainting. When that happens nowadays a court carries on as best it can amongst the ladders and the pails. The Thames magistrates of that time refused to be inconvenienced like that. They wrote to the Secretary of State: " During the painting of this office it will be impracticable to dispose of the public business here " and requested " that we may either remove to the Court house in Wellclose Square, which may be used without incurring any expense, or to the Dundee Arms, a public house close to the Office where we can have as on former occasions a large room for a fortnight at the charge of three guineas." Wellclose Square, they suggested, was too far from the waterside and from their books and papers, and out of the Thames district (it was in fact about a mile from Wapping). This would not weigh with a modern Home Secretary against the awful impropriety of housing a police station and police court in licensed premises (quite apart from the prospect of saving three guineas), but Lord John Russell took a broader view and gave his consent.

### *The magistrates and their servants*

The correspondence about their clerks and police officers shows the magistrates in a pleasing light. They obviously took a great interest in the welfare of their men, were keen advocates of anything which would improve their position, and vigorous objectors to any measure which might adversely affect them. Many of the letters call the attention of the Secretary of State to the excellent service of police officers compelled by age or illness to retire, and request that they be given a pension or gratuity. Thus, in October, 1818, the magistrates told the Secretary of State that Thomas Walker, who had died, had in their opinion " fallen a victim to the Fatigues, the Labors and the unremitting Exertions by Night and Day in all seasons, however inclement, in the faithful Discharge of his Duties . . . By means of his constant and persevering Exertions he has been the Instrument of bringing many Atrocious Offenders to Public Justice and Condign Punishment," and hoped that the Secretary of State would be able to make a grant to Walker's ailing widow and five young children.

They objected forcibly several times to various proposals which would reduce the incomes of their surveyors (or inspectors) and constables by depriving them of their share of certain penalties which existing legislation divided between the informer and the Crown. In 1811, for instance, they pointed out that of the £2,500 yearly collected in fines and forfeitures under the various statutes relating to the River Thames, half went to the officers who had laid the information and if this were altered the twenty surveyors, who received a salary of £65 a year, would be left very badly off—

much worse off than the Customs officers, who earned from £100 to £200 a year in addition to the proceeds of the goods they seized.

When William Warner, gaoler at the court for twenty years, reached the age of seventy-three in 1819, the magistrates wrote to the Secretary of State that he ought to be superannuated as he was " incompetent to perform his duty which requires a Man of firmness and of some personal strength inasmuch as he has to convey prisoners at night to Clerkenwell (a distance of four miles) through a low and populous part of the Metropolis." In recommending one of the surveyors to take his place they epitomised the essential qualities for a gaoler in the phrase " no man is more likely to combine firmness with temper and discretion."

The early Thames magistrates had a proper appreciation of the importance of the clerks. The institution was only ten years old when they wrote that " The Duties of this Office require from the Clerks a peculiar kind of attention with Precision and Fidelity without which we find ourselves under great difficulty in carrying on the business of the Office," and succeeding magistrates maintained that opinion. Unfortunately, they were twice disappointed in their trust, when two chief clerks in quick succession misappropriated public moneys and then combined to accuse the senior magistrate of similar conduct, but when in 1810 E. W. Symons became chief clerk and James Fell his deputy, Thames acquired two officers of the highest probity and efficiency who were to stay there for many years.

This survey of the contents of the Thames letter books, a rich store of information which it has by no means exhausted, cannot be brought to an end better than by quoting from a letter Symons and Fell wrote to the magistrates for passing on to the Secretary of State. They were anxious that the Thames Police Act, 1814, which was about to become law, should authorise an increase in their salaries. They wrote: " We would studiously avoid any presumptious line of conduct and hope we do not act improperly in requesting that you, Gentlemen, will be pleased to take an opportunity of conveying to his Lordship whatever circumstances may appear deserving of his notice.

" If it were our object to seek an additional income in order to meet the demands of extravagance we should merit little attention, but if the influences of a Police be at all affected by the individual conduct and character of those who compose it (residing as we do in the neighbourhood of the particular classes of persons who are the constant objects of its watchfulness)—if respectability be necessary in our situations, which, tho' humble may yet perhaps contribute to the subordination and rectitude of this extensive

Establishment—and which place us occasionally in communication with the Officers of different Departments of Government, and the various Docks at which persons are acting under the authority and superintendence of this police—if there be any weight in these circumstances, of which it would not become us to express an opinion, we most respectfully submit that while the salaries are inadequate to the most frugal expenses of an ordinary Housekeeper their amount may be somewhat too limited and the more so perhaps from the little prospective chances of additional emoluments which our situation affords."

The presence in the letter books of that piece of pompous obsequity shows that, although the Thames Police Office had much in common with its twentieth-century successor, the age in which they were in use was a very different age from ours.

# Corporal Punishment in Northern Ireland

By J. Ll. J. Edwards
*Reader in Law in The Queen's University, Belfast*

### *Retention of whipping as a judicial penalty and for prison offences*

There appears to be no immediate likelihood of Northern Ireland following the example set by the rest of the United Kingdom which, under the Criminal Justice Act, 1948, s. 2, abolished whipping as a form of judicial sentence. A limited measure of reform was instituted in Northern Ireland under the Children and Young Persons Act (N.I.), 1950, s. 54 (6), which prohibits resort to whipping as a discretionary penalty for any person under seventeen years of age, but although Stormont, when enacting the Criminal Justice Act (N.I.), 1953, chose to follow the lead set a few years earlier by the Westminster Parliament by introducing new forms of prison treatment such as corrective training and preventive detention, it failed to make any provision for the complete abolition of whipping. Power to order corporal punishment for prison offences follows much the same lines as in England and Scotland, being subject to the approval of the Ministry of Home Affairs,[1] and the offences punishable by whipping are those covered in the English Act of 1948, *viz.*, mutiny, incitement to mutiny and gross personal violence to a prison officer.[2]

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[1] See the Prison Rules (N.I.), 1954, r. 33 (S.R. & O. (N.I.), 1954, No. 7).

[2] Prison Act (N.I.), 1953, s. 14.

It is revealing, however, to note a striking difference in the maximum punishment awardable in the respective countries for such prison offences. Thus, whereas in England under the Prison Act, 1952, s. 18 which replaces the Criminal Justice Act, 1948, s. 54, the maximum number of strokes which may be imposed is:

(1) if the person is twenty-one years or over—eighteen strokes of the cat-o'-nine-tails or birch rod;

(2) if the person is under twenty-one years—twelve strokes of a birch rod;

in Northern Ireland, under the Prison Act (N.I.), 1953, s. 14, the maximum punishment is:

(1) if the prisoner is eighteen years or over—thirty-six strokes of the "cat," birch rod or cane,

(2) if the prisoner is under eighteen years—eighteen strokes of a birch rod or cane,

(3) if the prisoner is a Borstal trainee—twelve strokes of a cane,

Northern Ireland, it may be noticed, has elected to retain power to inflict corporal punishment for disciplinary offences in its one male Borstal institution, whereas no such power has ever existed in Scotland, and England dispensed with it under the Criminal Justice Act, 1948, s. 54. There is no need to stress the severity of the potential amount of whipping which a prisoner in Northern Ireland may incur, but this is all the more difficult to explain in view of the remarkable fact that Belfast Prison, which is the only prison in the Province for every class of male prisoner, has not known a single case during the years 1922 to 1955 involving the exercise of corporal punishment for one of the recognised prison offences. There was one instance in 1924 of threatened gross violence to a prison officer by a convict serving three years' penal servitude, but the sentence of ten strokes of the birch, awarded by the Visiting Justices, was suspended on condition of good behaviour. Despite the traditional belief in the natural fiery temperament of the Irishman, the experience at H.M. Prison, Belfast, has been singularly free of the type of assaults which are given so much notoriety in the English newspapers, and reliance has been placed, with seemingly satisfactory results, on close confinement, loss of privileges and dietary punishment as the means of dealing with any prisoner bent on violently assaulting a prison officer.

To revert to whipping as a judicial penalty, the present position in Northern Ireland is that it is retained for all those crimes which in England, prior to the passing of the 1948 Act, carried a possible sentence of corporal punishment. It is not proposed to enumerate the motley collection of offences which fell into this category, but when considering later the incidence of whipping in Northern

Ireland it is worth recalling the opinion of the English King's Bench judges in 1938 as expressed to the Departmental Committee on Corporal Punishment. In that (the Cadogan) Committee's Report (Cmd. 5684 of 1938, para. 60) the judges are quoted as advocating the retention of the then existing powers for the crimes of garroting (Garrotters Act, 1863, s. 1), armed robbery, robbery with violence and robbery in company with another (Larceny Act, 1916, s. 23 (1)), procuring, and unlawful carnal knowledge of a girl under thirteen years by a boy under sixteen (Criminal Law Amendment Act, 1885, ss. 2, 4), and living on immoral earnings and importuning by male persons (Criminal Law Amendment Act, 1912, s. 7 (5)). Furthermore, the judges recommended that whipping as a penalty should be extended to male persons of any age convicted of rape or carnal knowledge of a girl under thirteen years. Consideration to the same problem of extending the ambit of whipping in respect of sexual offences was given by a Northern Ireland Departmental Committee in 1943. This arose out of a particularly bad case of rape upon a thirteen-year-old girl by a gang of six youths which was tried before Lord Chief Justice Andrews at the Belfast City Commission in January, 1943. Following the realisation in that case of the absence of any legal power to impose a sentence of whipping for sexual offences by boys under sixteen years, the Murphy Committee of 1943, by a majority, recommended that the power of whipping conferred by the Criminal Law Amendment Act, 1884, s. 4 (*supra*), should be extended to similar offences against girls under sixteen years and to cases of rape by boys under sixteen. Suffice it to add that the Committee's recommendation has never been translated into law in Northern Ireland. Other additions, however, exist to the pre-1948 list of "whipping" crimes in England. As already mentioned in an earlier article ([1956] Crim. L.R. 15) corporal punishment is authorised under the Civil Authorities (Special Powers) Act (N.I.), 1922, s. 5, for arson; any offence punishable on indictment under the Malicious Damage Act, 1861; demanding with menaces with intent to steal (Larceny Act, 1916, s. 30); any offence against the Firearms Act, 1920, in relation to the possession of firearms; and any offence against the Special Powers Regulations in relation to the possession of firearms, military arms, ammunition or explosive substances.

### *Incidence of corporal punishment since 1922*

Justification for the continued retention of corporal punishment in Northern Ireland is not solely a question of statistics. Certainly Parliament at Stormont is likely to be actuated far more by the belief that whipping as a form of punishment is analogous to the death penalty in its efficacy as a deterrent to members of the I.R.A. and other illegal organisations. The scope of its operation is extremely wide and the unwillingness of Parliament to introduce even the limited reform of reducing the list of offences for which corporal punishment exists as a judicial penalty might be construed as indicating either unawareness or disbelief in the conclusions of the Cadogan Committee in 1938. Before proceeding, therefore, to analyse the incidence of corporal punishment in Northern Ireland, and to attempt to draw any lessons from such analysis, it may be well to recall the principal findings stated in that Committee's oft-forgotten but invaluable Report with its wealth of evidence, statistical and otherwise.

Three main conclusions were advanced: (1) there were, said the Committee, no offences for which long sentences of imprisonment were so ineffective as a deterrent that it is necessary, for the protection of society, to provide whatever additional element of deterrence may be afforded by the further penalty of whipping (para. 62); (2) all the available evidence failed to show that the introduction of a power of flogging has produced a decrease in the number of the offences for which it may be imposed, or that offences for which flogging may be ordered have tended to increase when little use was made of the power to order flogging, or to decrease when the power was exercised more frequently (para. 59); (3) the fear of corporal punishment does exercise a strong deterrent influence in restraining violent prisoners who would otherwise commit serious assaults on prison officers and that no other penalty would operate as an equal or sufficient deterrent (para. 75).

What then is the available evidence in Northern Ireland[3] whereby to judge the soundness of the Committee's findings? Of the wide range of multifarious crimes punishable by whipping under Northern Ireland law, the records since 1922 show three offences only in respect of which a sentence of whipping has been imposed. As the following table shows, judges in the troubled years of 1922 and 1923 used their statutory powers in a concerted attempt to stamp out political terrorists and to a degree which has not been repeated in recent years. It is, moreover, not insignificant that no present member of the Supreme Court judiciary has ever imposed a sentence of flogging.

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[3] I have again to thank R.U.C. Headquarters and the Governor of H.M. Prison, Belfast, for providing me with a full record of all instances in which corporal punishment has been awarded by the Northern Ireland judges and for the subsequent criminal records of those so punished.

| *Offence* | *Year* | *Sentences of corporal punishment* |
|---|---|---|
| Possessing firearms .. | 1922 | 4 |
| | 1923 | 2 |
| | 1940 | 4 |
| | Total .. | 10 |
| Possessing explosive substances .. .. .. | 1922 | 4 |
| | 1923 | 9 |
| | 1942 | 1 |
| | 1943 | 4 |
| | Total .. | 18 |
| Armed robbery, robbery with violence, robbery in company with another | 1922 | 4 |
| | 1923 | 19 |
| | 1925 | 2 |
| | 1926 | 1 |
| | 1927 | 5 |
| | 1929 | 3 |
| | 1930 | 1 |
| | 1936 | 4 |
| | 1938 | 1 |
| | 1942 | 1 |
| | Total .. | 41 |

By far the largest proportion of these whipping cases (fifty-six out of the total number of sixty-nine) were combined with sentences ranging between three years' and twelve years' penal servitude, the remainder being associated with comparatively short sentences of hard labour. As in England before 1948, it will be noticed that armed robbery and robbery with violence are the crimes for which flogging has most often been incurred, but even in respect of these particular crimes no record exists of such a sentence having been given since 1942. Indeed, the last occasion when corporal punishment was awarded in Northern Ireland dates back to 1943 in a case in which four men, discovered illegally drilling, were convicted of being in possession of explosive substances. Three of the prisoners, aged eighteen, nineteen and twenty years respectively, were sentenced to ten years' penal servitude and twelve strokes of the "cat," the youngest member of the group, aged sixteen years, receiving the astonishing sentence of twelve years' penal servitude and twelve strokes of a birch rod.

Allowing for the inherent defects of statistics based solely on the subsequent records of persons sentenced to corporal punishment, namely, their failure, first, to show what the man's subsequent career might have been if he had not been flogged and, secondly, how far his subsequent career was influenced by the flogging and imprisonment respectively, since 1922 of the sixty-nine prisoners in

Northern Ireland who have been flogged five have subsequently been again convicted of offences carrying a penalty of flogging and another nine have committed other indictable offences. With such a comparatively small number of cases to investigate it is dangerous to over-generalise, but the experience of Northern Ireland would seem to refute the Cadogan Committee's conclusion (para. 55) that men who receive corporal punishment are more likely to commit other offences than those dealt with by imprisonment alone.

### *Lessons to be learnt from the abolition of corporal punishment in England*

One of the principal tenets of those who, in England, advocate the restoration of flogging is its likely efficacy in checking the present increase in crimes of personal violence. Other methods having been tried and found ineffective, so it is argued, the time has come to have resort once again to corporal punishment. Cases of gross and brutal violence against the person naturally excite special indignation, and in calling for the reintroduction of whipping the prime motive would really appear to be adherence to the principle of retribution, that violence must be met with violence. With the continued existence of whipping as a judicial sentence in Northern Ireland it might be hoped that some useful information could be gleaned from the incidence of such crimes of personal violence in the Province. Unfortunately, the criminal statistics for Northern Ireland—normally comprising about six pages only of the Annual Report on the Administration of Home Office Services—are only a pale shadow of the criminal statistics for England and Wales compiled by the Home Office in London, or those of Scotland which are compiled quite separately by the Scottish Home Department in Edinburgh,[4] and consequently are not very helpful when endeavouring to obtain an accurate and detailed picture of the trends of individual crimes in the six counties. No analysis, for example, is given of the indictable offences known to the police, and although this is done according to the number of persons found guilty the analysis is not sufficiently particular to compare, say, the number of cases of rape, indecent assault or carnal knowledge or, more important for our present purpose, the respective number of cases of aggravated robbery, felonious and malicious wounding.

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[4] As the Northern Ireland Criminal Statistics are now compiled and published it would be impossible to relate to the Province the useful suggestion made a few years ago by the Inter-Departmental Committee on Social and Economic Research that a key should be prepared to enable valid comparisons to be made between the statistics of Scotland and England. That this is now possible in England and Scotland is the result of the work of a small working party comprising members of the Home Office, the Scottish Home Department and the Central Statistical Office—see (1956) 7 *British Journal of Delinquency* 50—an example which, it is to be hoped, might commend itself to the Northern Ireland Ministry of Home Affairs.

In fact, of course, one of the main fallacies of the case presented for the restoration of flogging is the inability, or may it be unwillingness, to distinguish between, on the one hand, those crimes of personal violence which formerly carried a discretionary sentence of whipping, *viz.*, armed robbery, robbery with violence and robbery in company (Larceny Act, 1916, s. 23 (1) ), and, on the other hand, crimes of personal violence for which whipping has never been a possible sentence, *viz.*, principally felonious and malicious wounding or causing grievous bodily harm (Offences against the Person Act, 1861, ss. 18 and 20). Nowhere is the importance of maintaining this distinction revealed more than in the following comparative table which shows the crime rate in England and Wales for the respective crimes during the past ten years.[5]

| *Offence* | 1946 | 1947 | 1948 | 1949 | 1950 | 1951 | 1952 | 1953 | 1954 | 1955 |
|---|---|---|---|---|---|---|---|---|---|---|
| Felonious wounding .. | 498 | 572 | 646 | 625 | 976 | 1,078 | 1,027 | 981 | 1,048 | 1,042 |
| Malicious wounding .. | 2,510 | 2,908 | 3,547 | 3,705 | 4,201 | 4,445 | 4,873 | 5,111 | 5,425 | 5,884 |
| Armed robbery, robbery with violence .. | 804 | 842 | 978 | 860 | 812 | 633 | 790 | 754 | 604 | 578 |

Northern Ireland legislators examining these figures may, it is suggested, derive two principal lessons concerning the problem of corporal punishment. First, the steady increase in England in the number of felonious and malicious wounding cases—" non-whipping " crimes—is in no way related to the major reform instituted by the Criminal Justice Act, 1948. Secondly, and more important in that it tends to provide striking confirmation of the 1938 Committee's findings, although there are fluctuations from year to year, the general trend of cases of aggravated robbery under the Larceny Act, 1916, s. 23 (1)—the main whipping offences before 1948—has been on the downward side since whipping was abolished as a judicial penalty. If reform of the law of Northern Ireland in regard to corporal punishment is ever envisaged there appear to be telling arguments from the English records in favour of its complete abolition as a court sentence, but it is feared that a negative attitude of leaving well alone is more likely, based on the absence for many years of any resort to the existing statutory powers by the judiciary.

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[5] Figures relating to felonious and malicious wounding are abstracted from Table A (Indictable Offences known to the Police) in the annual Criminal Statistics. The same table gives the annual total of cases of robbery, but for our purpose this is unsatisfactory since it fails to distinguish between, on the one hand, simple robbery and, on the other, armed robbery, robbery with violence and robbery in company with another. Figures for the latter group of offences were recently announced by the Home Secretary—H.C. Debates, Vol. 551, col. 1942; April 26, 1956.

# *The Magistrates' Association*

By BARTHA DE BLANK, B.COM., J.P., *General Secretary*

The Annual General Meeting of the Magistrates' Association was held in London on Thursday and Friday, October 18 and 19, 1956. Lord Merthyr, the Chairman of the Council, presided, and the principal speakers were the Lord Chief Justice and the Lord Chancellor.

The meeting was preceded by a luncheon at which Lord Mancroft, Joint Under-Secretary of State for the Home Department, spoke of his concern at the present overcrowding in prisons, partly due to sending to prison defaulters on maintenance orders; he commended the Scottish system of the arrestment of wages. He wanted more productive work for prisoners than the sewing of mail bags.

Lord Goddard C.J. began his address by saying that this was the sixty-seventh meeting of justices that he had addressed, which showed how much he appreciated their work. He first dealt with appeals to quarter sessions and said he thought it desirable that quarter sessions should, if they were reducing a sentence on appeal, give their reasons for so doing. Referring to appeal by way of case stated, he reminded the meeting of the Review of Justices' Decisions Act, 1872, which enables justices in certain cases to put on affidavit the reasons for their decision.

Lord Goddard then spoke of justices' clerks retiring with the magistrates. It was undesirable that this should happen as a matter of course, though magistrates had every right to send for their clerk if they required his help on questions of law. Appearance, was, however, important and he suggested that the clerk should return to the court before the justices and not with them.

Turning to matters which he thought called for reform, Lord Goddard said that magistrates should have power, in a proper case, to deal with ordinary minor housebreaking offences.[1] He also referred to the tedium of taking depositions in some of the lengthy cases which had to go to a higher court.

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[1] But see p. 790, above.

On Friday morning the Annual Report was adopted subject to an amendment calling for a committee of inquiry to examine the system of the arrestment of wages in Scotland.

The Lord Chancellor, who was re-elected President of the Association at this session, addressed the members later. He said that the last year had provided excellent examples of the way in which the Association had been able to help the Lord Chancellor in his work of training magistrates. The Association's revised handbook, "Notes for New Magistrates" was now being sent to every new justice on appointment, and his Department had also arranged for the Association's postal study course to be made available to magistrates' courts committees as part of their schemes of instruction. As a result, over 200 justices were already taking the course.

Lord Kilmuir then referred to the deplorable increase in road casualties and drew attention to the size of the average fine and the scant use made of disqualification. He suggested that with the substantially increased penalties for certain offences in the new Road Traffic Act, courts should consider their present practice in the light of modern conditions. He was anxious that the discretion of magistrates should not be limited and hoped that the introduction of minimum sentences would prove unnecessary.[2]

Various resolutions were then discussed. A motion was carried calling for a reversal of the provision of the new Road Traffic Act which took away the power to limit disqualification to a certain class of vehicle. A resolution carried by a large majority asked for a review of the practice of magistrates' courts in determining penalties to be imposed for traffic offences. Another resolution urging the Home Secretary to set up remand centres as provided for in the Criminal Justice Act, 1948, was carried without dissent. A recommendation that all prisoners sentenced to a term of imprisonment of eighteen months or over should on discharge be subject to licence and recall for misbehaviour was referred to the council for consideration, as was a resolution calling for separate remand homes for non-delinquents brought before the juvenile court. Resolutions were carried by a majority urging that the law be amended to enable magistrates' courts to try minor housebreaking offences, and drawing the attention of the Home Secretary to the urgent need for improving and enlarging the accommodation in local prisons. A motion urging the appointment of married couples to supervise girls' remand homes, approved schools, and other institutions was lost by a majority.

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[2] See p. 788, above.

# *Practice and Procedure*

## Committal for Trial to Nearest Convenient Court

In *R.* v. *Streams,*[1] heard by the Court of Criminal Appeal on October 3, 1956, Lord Goddard C.J. made the following observations concerning the power of a magistrates' court to commit to more convenient assizes or quarter sessions: "The offence for which S. was sentenced was committed for trial in Reading Borough just after the Assizes. The justices, using their powers of committing an accused person to a "foreign" court, committed S. for trial to Hereford. No doubt that court was chosen because it is on the Oxford Circuit and Reading is also on the Oxford Circuit. The case could not be tried at Hereford because the learned judge had only three days there, and it was sent on to Shrewsbury. But both Hereford and Shrewsbury are a long way from Reading and the increased expense of this prosecution must have been very great. The obvious place to send this case for trial was to the Central Criminal Court. If that had been done, a great deal of expense would have been saved. Justices should remember that they ought to commit to the nearest court that can conveniently be found (not necessarily to a court on the same circuit), and should bear in mind the question of keeping down the costs of prosecutions." [Henry Palmer, *Barrister-at-Law.*]

## Duty of Prosecution to Make Available at the Trial those Witnesses Named on the Indictment

The duty of the prosecution to make available the witnesses named on the indictment was considered in a case, *R.* v. *Garner,*[2] heard at Liverpool County Sessions on October 16.

The prisoner pleaded not guilty to two counts, the first alleging that he was drunk in charge of a motor-car, the second alleging dangerous driving. The deposition of one prosecution witness disclosed that in cross-examination his evidence favoured the prisoner. That witness was named with nine others on the back of the indictment. He was an American subject and at the time of the trial he had left the United Kingdom and was in Texas. He had been bound over by the justices to attend the trial. Counsel for the prisoner submitted that the prosecutor had a duty to make available at the trial those witnesses named on the back of the indictment and that it was unreasonable that the defence should secure the attendance of the prosecution witness overseas, in view of the expense involved, and the impossibility of enforcing his attendance. He conceded that the prosecution was not bound to call such witnesses and that if such a witness were called and refused to give evidence for the defence he could not be made to do so. Counsel for the prosecution submitted that there was no obligation to produce witnesses named on the back of the indictment. The purpose of naming witnesses was merely to indicate the broadest limits of the prosecution case. The absence of one witness could not invalidate that case, in particular where there were nine other prosecution witnesses, and the absent witness was an alien outside the jurisdiction. He referred to the judgment of the Privy Council in *El Dabbah* v. *Att.-Gen. for Palestine* [1944] A.C. 156, where it was held that " the prosecutor has a discretion as to what witnesses should be called for the prosecution, and the court will not interfere with the exercise of that discretion, unless, perhaps, it can be shown that the prosecutor has been influenced by some oblique motive " and where reference was made to " the long-established right of the prosecutor to exercise his discretion to determine who the material witnesses are " ; and submitted that there were sufficient reasons in the present case not to tender the absent witness.

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[1] [1956] 1 W.L.R. 1344; [1956] 3 All E.R. 421n. The applicant did not appear and was not represented. The Crown was not represented.

[2] For the prosecution: *G. Bean* (instructed by the Town Clerk, Warrington). For the defence: *T. Pigot* (instructed by Messrs Lake & Co., Runcorn).

It was held that the defence is entitled to rely on the attendance of prosecution witnesses named on the indictment. Since the defence had the same opportunity as the prosecution to secure the attendance of the witness, the case should be postponed to give the defence that opportunity. The prisoner elected to continue trial in the absence of the witness concerned. At the conclusion of the opening by prosecuting counsel, the prisoner pleaded Guilty to dangerous driving. This plea was accepted by the prosecution and by the court. [Peter G. Smith, *Barrister-at-Law*.]

### Deserters and Absentees from Visiting Forces

The Home Office has issued a circular (No. 128/1956, dated September 11, 1956) concerning the arrest of deserters from visiting forces and their appearance before a magistrates' court.

# Summary Justice

### *Aviation*

Using a Government airfield without permission; fine of £200 reduced on appeal to £50; Jones: Winchester Quarter Sessions (*The Times*, October 27).

### *Children and young persons*

Intoxicating liquor. Giving intoxicating liquor to child under five; woman added teaspoonful of stout to a child's lemonade, said child wanted drink the same colour as hers; fined £1; Lindstrom: Blackpool Magistrates' Court (*Liverpool Evening Despatch*, October 12).

Employment. Employing a boy under the age of 13 to deliver newspapers; ten previous offences; fined £20; O'Neil: Hove Magistrates' Court (*Evening Argus*, October 23).

Fire. Allowing nine-month-old child to be in a room with an unprotected fire; fined 6s.; Holden: Blackpool Magistrates' Court (*The Daily Telegraph*, November 3).

### *Highway*

Interrupting free passage. Throwing hold-all bag in front of a girl cyclist causing her to fall off the bicycle; fined £2; Lee: Wallasey Magistrates' Court (*Liverpool Echo*, October 4).

### *Larceny, etc.*

Shoplifting. Housewife stealing food worth 16s. from store; fined £15; Bloom: Marylebone Magistrates' Court (*Evening Standard*, October 3).

Receiving. Sentence of four months' imprisonment imposed on corn chandler for receiving two bags of canary seed reduced on appeal to quarter sessions to a fine of £20; Paris: London Sessions (*Evening Standard*, October 9).

### *Medicine*

Dentist. Unlawfully practising as a dentist while not registered under the Dentists Act, 1878; fined a total of £160 on four summonses; Bartsch: Cardiff Magistrates' Court (*Liverpool Echo*, October 4).

*National assistance*

Two men failing to perform their allotted tasks, rolling a lawn, at a reception centre; each fined £3, with alternative of seven days' imprisonment; Griffiths, Roberts: Hitchin Magistrates' Court (*The Times*, October 20).

*Prisons*

Dropping tobacco over fence of garden near Walton Prison with intent that it should come into possession of a prisoner; fined £10; Davies: Liverpool Stipendiary Magistrates' Court (*Liverpool Echo*, October 16).

*Public health*

Rubbish. Four men disturbing the surface of a refuse tip contrary to the Public Health Act, 1936, s. 76; two fined £3 each, two fined £1 each; Ogden, Barton, Syers, Butler: Warrington Magistrates' Court (*Liverpool Echo*, October 4).

*Rivers*

Fishing. Four men injuring immature freshwater fish; each fined £2, ordered to pay 12s. costs; Fairham, Jollens, Parsons, Watson: Epworth Magistrates' Court (*Manchester Guardian*, October 12).

Fishing. Using gorge bait; fined £3; Fairham: Epworth Magistrates' Court (*Manchester Guardian*, October 12).

*Road traffic*

Trailer. Causing a trailer to stand detached from a car without one at least of its wheels being prevented from revolving; fined £10; Traynor: Wallasey Magistrates' Court (*Liverpool Echo*, October 5).

Driving while disqualified. Man who had been sent to prison for twenty-one months and disqualified from driving for life driving while disqualified; fined £100 and imprisoned for six months; Dutton: Sheffield Magistrates' Court (*Manchester Guardian*, October 23).

# *Case and Comment* *

**Approved Schools**—*Committal to approved school—wrong authority named in order*

BARNSLEY CORPORATION *v.* LANCASHIRE COUNTY COUNCIL [1] (Q.B. Divisional Court: Lord Goddard C.J., Hilbery and Ashworth JJ.: October 17, 1956) ([1956] 3 W.L.R. 820).

A boy, who had committed an offence while in an institution maintained by the Lancashire County Council, was committed by justices to an approved school. Prior to his residence in the institution, the boy had lived with his parents in Lancashire, but the parents had subsequently left the county and at the time of the approved school order were living in Barnsley. The justices, holding that the boy's place of residence was the place where his parents then resided, named the Barnsley Corporation in the order pursuant to section 70 (2) of the Children and Young Persons Act, 1933. On appeal by the corporation under section 90 (2) of the Act on the ground that at the material time the boy was resident in the district of the county council, the justices dismissed the appeal. The corporation appealed to the Divisional Court.

*Held,* dismissing the appeal, (1) that as the period during which the boy was in an institution, according to the proviso to section 70 (2), should be disregarded, and as the home where he had previously lived no longer existed and he had never lived at his parents' address at Barnsley, the justices should have arrived at the conclusion that the boy's residence for the purpose of the section was unknown and should have named in the order the local authority in whose district the offence was committed, *viz.,* the Lancashire County Council. But (2) as it was only open to the corporation under section 90 (2) to appeal on the ground that the boy's place of residence was within the district of another authority, not on the ground that the residence of the child was unknown, the corporation remained the authority named in the order even though they should not have been so named. [J. D. P.]

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* Reported, unless otherwise stated, by Henry Palmer and J. D. Pennington, Barristers-at-Law. Commentary by J. C. Smith, LL.B. (Cantab), Barrister-at-Law.

[1] For the corporation: *J. M. McLusky* (instructed by Torr & Co. for Town Clerk, Barnsley). For the county council: *J. M. Davies* (instructed by Norton, Rose & Co.).

**Certiorari**—*False affidavits—application made relying on*

R. *v.* STEVENS, *ex p.* CALLENDER [2] (Q.B. Divisional Court: Lord Goddard C.J., Hallett and Ashworth JJ.: October 25, 1956) (*The Times*, October 26, 1956).

On June 22, 1956 ([1956] Crim.L.R. 617), an application for a writ of habeas corpus by a mother of a 14-year-old child in respect of an order of the Kingston-on-Thames justices detaining the child in a children's home as being in need of care and protection, was granted. In granting the application the Divisional Court relied on certain affidavits sworn by the mother which stated that the mother and child had been usually resident in Kent for the past five years and for the greater part of that time the child had been a registered pupil at a school in Kent; that their presence in Kingston was due to a temporary visit as a result of a fire at their home in Kent. On June 29, the mother for herself and as next friend of the child applied for and obtained leave to move for an order of certiorari to quash an order made by a magistrate directing the child to a place of safety and also the order of the Kingston justices detaining the child. On this application the same affidavits were relied on by the applicants as had been used in the habeas corpus proceedings. During the present hearing of the application the court were satisfied that those affidavits were in many respects untrue and presented a wholly false picture with regard to the true state of affairs regarding the mother and the child at all material times. In the circumstances counsel for the applicants intimated that the mother wished to withdraw from the proceedings, but asked that certiorari should be granted so far as the child was concerned.

*Held*, refusing the application, that the present motion could not have been brought but for the leave granted on June 29, and whatever the position might have been had the child still been in custody, the court could not dissociate the child from the evidence on which leave to move was granted. It was plain that certiorari was sought mainly to facilitate an action by the child against the justices or the county council officials, possibly both, but that was no ground for departing from the rule emphasised in *R.* v. *Kensington Income Tax Commissioners* [1917] 1 K.B. 486 that as leave was obtained on affidavits which were untrue in material respects the court should refuse to consider the case further. While there might be special circumstances which would induce the court to depart from that rule, they did not exist in the present case and the application would be dismissed.

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[2] For the applicants: *Paul Sieghart* (instructed by Theodore Goddard & Co.). For the justices: *George Baker Q.C., D. M. Wacher* (instructed by Wilkinson, Howlett & Moorhouse). For the assistant children's officer: *Geoffrey Lawrence Q.C., L. G. Scarman* (instructed by Wyatt & Co., for W. W. Ruff, Kingston-on-Thames).

*Quaere* whether the justices had jurisdiction to make the detention order. [J. D. P.]

COMMENTARY. The child had regained her liberty as a result of the habeas corpus proceedings, but her advisers apparently contemplated proceedings for malicious prosecution or false imprisonment to obtain compensation for the alleged wrong which she had suffered. Neither of these actions would lie while the child still appeared on the record as a child being in need of care and protection. The defect of jurisdiction alleged (absence of evidence on which to make the order) did not, of course, appear on the face of the record.

*R.* v. *Kensington Income Tax Commissioners* concerned an application for a rule nisi for a writ of prohibition and the Court of Appeal laid down a rule which apparently applies to all *ex parte* applications. The rule requires not merely that the applicant should refrain from false statements but that he should make full and fair disclosure of the material facts.

### **Conspiracy**—*Indictment—conspiracy to acquire metals in Germany by fraud*

R. *v.* OWEN AND SETH-SMITH [3] (Court of Criminal Appeal: Lord Goddard C.J., Ormerod and Ashworth JJ.: October 2, 1956) ([1956] 3 W.L.R. 739; [1956] 3 All E.R. 432).

O. and S. were convicted at the Central Criminal Court on one count of conspiring to defraud and on a second count of conspiring to utter forged documents, and were sentenced to four years' and two years' imprisonment respectively ([1956] Crim.L.R. 550). It was alleged that O. and S. conspired to defraud a German export control department (known as Z.A.K.) by causing Z.A.K., to grant licences to export metals from Germany, by means of forged documents purporting to be given by a department in Ireland certifying that the metals would be imported into Ireland and not re-exported, well knowing that the metals were in fact to be exported to Russia. On appeal to the Court of Criminal Appeal against conviction, it was contended on behalf of the appellants that a conspiracy in England to commit an offence abroad was not an indictable offence.

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[3] For the appellant Owen: *Neil Lawson Q.C., Sebag Shaw* (instructed by Stikeman & Co.). For the appellant Seth-Smith: *Alexander Karmel Q.C., I. C. Baillieu* (instructed by Galbraith & Best). For the Crown: *Neville Faulks, David Hirst* (instructed by the Solicitor, Board of Trade).

*Held*, quashing the conviction on the first count, that the question whether a conspiracy in England to commit a crime or to effect an unlawful object abroad was indictable in this country had never been authoritatively decided. Except where there were express statutory provisions, offences committed by British subjects abroad were not punishable here. But the offence of conspiracy was indictable as soon as an agreement was made to do an unlawful act whether the agreement was carried into effect or not. If two Englishmen committed a burglary in France they could not be indicted for that crime in England and it would certainly seem illogical to hold that by agreeing to go to France to commit the offence they were guilty of a crime against our laws. In the opinion of the court, the true rule was that a conspiracy to commit a crime abroad was not indictable in this country unless the contemplated crime was one for which an indictment would lie here. The offence which O. and S. were charged with conspiring to commit in the first count in the present case was not one which would have been indictable in England and, accordingly, the conviction on that count would be quashed. As to the second count, there was evidence to show that three of the six forged documents were enclosed in letters from London to the government department in Western Germany. The statutory definition of uttering in section 6 (2) of the Forgery Act, 1913, was in sufficiently wide terms to include the posting of a letter containing a forged document. The conviction on the first count only would be quashed and the sentences reduced to two years' and eighteen months' imprisonment respectively. [H. P.]

COMMENTARY. This being a case of first impression the court was in fact free to lay down the rule which it thought best. Donovan J. considered the pros and cons carefully and pointed out that a general rule either way would produce anomalies. In the result he was careful to confine his decision to the facts—*i.e.*, he held it unlawful to conspire to defraud a foreign subject in such a way that the foreign subject could sue the tortfeasor in this country: [1956] Crim.L.R. 550. In reversing this ruling the court lays down the general rule stated in the report which will give rise to anomalies foreseen by Donovan J. For example, if two men conspire in England to inflict grievous bodily harm on a third while he is on a day trip to Boulogne, the conspiracy is not indictable.

In *R.* v. *Martin* [1956] Crim.L.R. 417 Devlin J. drew a distinction between (a) " crimes conceived by the common law—which are mostly offences against the moral law, such as murder and theft," which he regarded as universal offences, having no territorial limits; and (b) those statutory offences which are created only in relation to a particular place. At common law the courts would assume jurisdiction over neither class of offence if committed abroad, and it is only in exceptional cases such as murder and bigamy that the English courts now, by statute, have jurisdiction over offences committed abroad. The rule in the instant case is so phrased that a conspiracy in England will be indictable only if its ultimate object is one of the exceptional crimes which itself could be tried by an English court. Indeed the Lord Chief Justice expressly said that a conspiracy in England to commit a burglary—obviously one of Devlin J.'s universal offences—in France, would not be indictable here.

If Devlin J.'s distinction be a valid one a conspiracy to commit a crime of type (a) abroad ought, logically, to be indictable here; there is no difficulty over jurisdiction, because the conspiracy is completed in England; and the act to be accomplished—according to Devlin J.—is a crime by English law. There would be obvious difficulties in defining those offences which are universal, but such a flexible rule might have avoided some of the anomalies which may now arise. On the other hand it might be argued that the effect would be to leave too much to the discretion of the judges.

Appeal has been made to the House of Lords.

### **Contempt**—*Mens rea—lack of intention or knowledge only material in relation to penalty*

R. *v.* ODHAMS PRESS, *ex p.* ATTORNEY-GENERAL[4] (Q.B. Divisional Court: Lord Goddard C.J., Pilcher and Ashworth JJ.: October 11, 1956 ([1956] 3 W.L.R. 796; [1956] 3 All E.R. 494).

On June 13, 1956, one M. was arrested and brought before the magistrate charged with brothel keeping. He was remanded until June 27, when he was committed for trial at London Sessions, which opened on July 3. His case had not been reached when on Sunday, July 15, *The People*, a newspaper, published an article headed " Arrest this Beast " containing a photograph of M. and constituting an attack on him and alleging that he was involved in purveying vice and managing street women. Neither the reporter nor the editor of the newspaper knew of the proceedings against M. On a motion by the Attorney-General for writs of attachment against the printers and publishers of the newspaper, the editor and the reporter, it was contended on behalf of the respondents that as there was no knowledge of the proceedings against M., there was no contempt.

*Held*, adjudging the respondents guilty of contempt, that *mens rea* need not be present to constitute contempt of which the court would take cognizance and punish, and that lack of intention or knowledge was only material in relation to the penalty which the court would inflict. Those who published matter of that description charging alleged offences against the criminal law did so at their peril and the test was whether the matter complained of was calculated to interfere with the course of justice, not whether the authors and printers intended that result. It was difficult to imagine anything more calculated to prejudice the criminal proceedings against M. than the article which was obviously published with a view to increasing circulation and no other object and the court, therefore, could not look upon it as other than a serious matter and would order the newspaper company to pay a fine of £100. As neither the editor nor the reporter knew of the proceedings the court would not impose a sentence of imprisonment, but the evidence fell far short of showing that standard of care which persons indulging in that kind of journalism were bound to take and each of them must pay a fine of £500.

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[4] For the Attorney-General: *Sir Reginald Manningham-Buller Q.C., Att.-Gen., Rodger Winn* and *A. C. Warshaw* (instructed by the Director of Public Prosecutions). For the respondents: *Gerald Gardiner Q.C., H. Davidson* (instructed by Simmons & Simmons).

[Miss J. F. Lamb, *Barrister-at-Law*.]

COMMENTARY. The court followed the old cases of *Roach* v. *Garvan* (1742) 2 Atk. 469 and *Ex parte Jones* (1806) 13 Ves.Jun. 237 where printers of matter tending to obstruct the course of justice were held liable for contempt although they were ignorant of the nature of the published material. The more recent cases of *Metropolitan Music-Hall Co.* v. *Lake* (1889) 58 L.J.Ch. 513 and *Re Marquis Townshend* (1906) 22 T.L.R. 341 were distinguished as cases in which the court did not " consider that the matter complained of was sufficiently serious to call for action." In the former case the motion for committal was dismissed on the ground that it was not bona fide, but Chitty J. said, *obiter,* that it would be an extension of the law to hold that the respondents were bound at their own peril to know of the existence of an action. In the latter case, however, it seems to have been the *ratio decidendi* of Cozens Hardy M.R., who delivered the main judgment in the Court of Appeal, that the respondents were not guilty of contempt because they did not know of the pending proceedings. It is not clear that this case was satisfactorily distinguished.

In *R.* v. *Evening Standard Co.* [1954] Crim.L.R. 465 it was held that the editor and proprietors of a newspaper are vicariously liable for the mistake of a reporter which amounts to a contempt. It now appears that contempt of court is a crime which involves what Dr. Glanville Williams (*The Criminal Law*: *The General Part*, p. 286) calls the " tyrannous combination " of strict responsibility and vicarious responsibility.

On the whole subject see Professor A. L. Goodhart, " Newspapers and Contempt of Court in English Law " (1935) 48 *Harvard Law Review* 885.

**Evidence**—*Identification—doubt of witness after trial—appeal*

R. *v.* WILLIAMS[5] (Court of Criminal Appeal: Lord Goddard C.J., Hilbery and Ashworth JJ.: October 3, 1956) (*The Times*, October 4, 1956).

W. was convicted at assizes of robbery with violence and sentenced to eight years' imprisonment. The prosecution at the trial relied mainly on the evidence of one Wakerell who had attended an identification parade and identified W. as one of the men who took part in the offence. W. pleaded an alibi and called witnesses to support it. On appeal to the Court of Criminal Appeal against conviction, counsel for the Crown told the court that, after the trial and as a result of further matters which had come to light, the witness Wakerell had been confronted with one S. (a prisoner awaiting trial on another charge of robbery) and could no longer be certain that W. was one of the offenders. In those circumstances he (counsel) was not instructed to support the conviction.

*Held,* allowing the appeal, that this was a most unfortunate case because the identification had now been shown to be wrong. Accordingly, the conviction would be quashed. [H. P.]

COMMENTARY. Identification evidence is notoriously subject to error. See Glanville Williams, *The Proof of Guilt,* 83 *et seq.,* where it is pointed out that "juries do not recognise its unreliable nature, and there is still no practice of cautioning juries upon it" (p. 95). Counsel for the appellant in the present case asked the court to give a general direction requiring a warning to be given to juries of the dangers of convicting without corroboration where the only evidence against an accused person is identification by one witness. The Lord Chief Justice said that the court would not lay down hypothetical directions for a jury. The court has, however, in the past laid down such hypothetical directions—*e.g.,* in the case of the evidence of accomplices: *R.* v. *Baskerville* [1916] 2 K.B. 658; *Davies* v. *D. P. P.* [1954] Crim.L.R. 305—and there would seem to be a strong case for a similar direction in the case of identification evidence.

In *R.* v. *Benjamin* (1913) 8 Cr.App.R. 146 the court said that counsel ought not to inform the court of new facts which he has discovered in the course of preparing the appeal, but should obtain and tender proper evidence. In the present case the court appears to have allowed counsel to describe police investigations subsequent to the trial. Perhaps the distinction is that in *Benjamin* the new facts were tendered by counsel for the prisoner to establish a ground of appeal, whereas in the instant case Crown counsel tendered the new facts in favour of the defence.

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[5] For the appellant: *T. K. Homer* (instructed by John W. Sachs & Co., Bromley). For the Crown: *T. K. Edie* (instructed by the Solicitor, Metropolitan Police).

### **False Imprisonment**—*Officer of local health authority removing patient to hospital—liability*

CONNOLLY *v.* SMITH [6] (Liverpool Court of Passage: Glynn Blackledge, Q.C.: June 27, 1956) (106 L.J. 570).

The plaintiff claimed damages against the defendant alleging false imprisonment. The defendant alleged that he had removed the plaintiff to hospital on the ground that it was necessary for the plaintiff's welfare and for the public safety. In so doing, the defendant was acting as the duly authorised officer of the local health authority under section 20 of the Lunacy Act, 1890, as substituted by section 50 of and Schedule IX, Part I, to the National Health Service Act, 1946, and, accordingly, contended that he was protected from personal liability by section 265 of the Public Health Act, 1875, as extended to officers of local health authorities by section 72 of the Act of 1946.

*Held,* giving judgment for the defendant, that although the National Health Service Act, 1946, had substituted a new section 20 to the Lunacy Act, 1890, the new section remained part of the Act of 1890 and did not become part of the Act of 1946, and the defendant therefore could not avail himself of the defence under the Act of 1875 as extended by the Act of 1946. However, following *Harward* v. *Hackney Union* (1898) 14 T.L.R. 306, a duly authorised officer had the same discretion as a relieving officer had had under the original section 20 of the Act of 1890, and as the defendant had acted honestly he could not be liable.

[Miss C. J. Ellis, *Barrister-at-Law.*]

COMMENTARY. Section 265 of the Public Health Act, 1875, gives protection to officers of local authorities for things done for the purpose of executing that Act; section 72 of the National Health Service Act, 1946, extends that protection to things done for the purpose of executing the 1946 Act. It now appears that an officer acting under the new section 20 of the Lunacy Act, 1890, is not acting for the purpose of executing the 1946 Act, although the new section 20 is substituted by the 1946 Act.

Except where there is a statutory defence the only intention which the plaintiff in an action for false imprisonment need prove is an intention " to do the act which effects the confinement. Malice is irrelevant." Street, *The Law of Torts,* p. 22. Section 20 of the Lunacy Act, 1890, gives power to " a duly authorised officer of the local authority or any constable " to remove persons of unsound mind in urgent cases. Detention under this section must not be for more than three days. In *Harward* v. *Hackney Union* the Court of Appeal pointed out that section 20 said nothing about the officer having to take reasonable care; he must simply be satisfied that it is necessary, for the public safety or the welfare of the person concerned, to remove the alleged lunatic. It appears that, under the statute, honest belief even on unreasonable grounds is a defence. *Cf.* the rule in Deceit: *Derry* v. *Peek* (1889) 14 App.Cas. 337.

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[6] The plaintiff appeared in person. For the defendant: *J. M. Kennan* (instructed by the Town Clerk, Liverpool).

**Forgery**—*Uttering forged documents.* See R. *v.* OWEN AND SETH-SMITH, p. 829, above.

**Fraudulent Conversion**—*Elements of the offence—sentence*

R. *v.* HUGHES [7] (Court of Criminal Appeal: Lord Goddard C.J., Hilbery and Ashworth JJ.: October 3, 1956).

H. was convicted at quarter sessions of fraudulent conversion and sentenced to fifteen months' imprisonment. The facts proved at the trial were that H. was a builder who was asked by one C. to put in a shop front and to do some repairs to a small property. H. asked C. to advance him £50 to buy materials, and C. did advance that sum together with a further £100 for the same purpose. H. did not use the money for the purpose of buying materials but he paid off his own debts and spent some of the money on repairs to his motor-car. H. appealed to the Court of Criminal Appeal against his conviction on the ground that the jury were misdirected, and against his sentence.

*Held,* dismissing the appeal, that this court could find no fault in the summing-up. It was clearly laid down in *R.* v. *Bryce* [1956] Crim.L.R. 122 that the three necessary ingredients in the offence of fraudulent conversion were (i) that the money was entrusted to the accused for a particular purpose; (ii) that the accused used the money for some other purpose; and (iii) that the accused was acting fraudulently. In the present case the money was paid over for a particular purpose and not generally on account, and the summing-up put the three ingredients of the offence with great clarity. Even though H. was a man of previously good character, fifteen months' imprisonment was not too severe a sentence for the offence. The appeal would be dismissed. [H. P.]

COMMENTARY. In *R.* v. *Jones* (1948) 33 Cr.App.R. 11 the accused agreed with the prosecutrix to decorate a room for a fixed price. He said he wanted some money with which to buy paint and the prosecutrix advanced him a sum which was to be set against the amount agreed upon. Jones took the money but never did the work. After pleading guilty to fraudulent conversion he appealed against his sentence and the court quashed his conviction on the grounds that there was no fiduciary relationship and that the money became the accused's money when it was handed to him. In *R.* v. *Dent* [1955] Crim.L.R. 501 Lord Goddard C.J. withdrew certain *dicta* concerning larceny by a trick which fell from him in *Jones,* but asserted that the conviction for fraudulent conversion was rightly quashed.

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[7] For the appellant: *I. R. Carmichael* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *E. Russell* (instructed by D. E. Morgan, Chelmsford).

It is very difficult to reconcile *Jones* with *Bryce* and, especially, with the instant case where the facts appear to be exactly similar. When the court says that the money must be used for a particular purpose does it mean that the *specific notes and coins* handed over must be used for that purpose? If such were the rule it might be possible to reconcile the cases by saying that Jones, under the arrangement which he had made, was free to use an equivalent sum and not necessarily the same notes and coins; but that Bryce and Hughes were required to use the particular money advanced. It is submitted, however, that this would be an unsatisfactory rule and would impose on fraudulent conversion limitations which apply to larceny by a bailee, and which the crime of fraudulent conversion was created to avoid. *Cf.* Kenny, *Outlines of Criminal Law*, 16th ed., p. 268. There is furthermore, authority against such a view: *R.* v. *Smith* [1924] 2 K.B. 194 where the accused was convicted of converting money, given to him as security, which he was to *deposit at Barclays Bank* and return at the end of three months. It is submitted, therefore, that there is no satisfactory way of reconciling *Jones* with *Bryce* and the instant case, and that the latter two cases should be preferred.

**Indictment**—*Conspiracy.* See R. *v.* OWEN AND SETH-SMITH, p. 829, above.

**Jurisdiction**—*Conspiracy to commit offence abroad.* See R. *v.* OWEN AND SETH-SMITH, p. 829, above.

**Lottery**—*Printing tickets for use in a lottery—tickets not intended for use in a particular lottery*

MCKAY *v.* GILLIES[8] (Q.B. Divisional Court: Lord Goddard C.J., Hallett and Donovan JJ.: October 17. 1956) ([1956] 1 W.L.R. 1402).

The appellants, who were printers, devised a method of printing tickets which could be used by anyone promoting a lottery. In

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[8] For the appellants: *Dudley Collard* (instructed by Lewis Barnes, Wheeler & Co.). For the prosecutor: *Victor Durand* (instructed by Solicitor, Metropolitan Police).

May or June, 1955, one E., wishing to promote a lottery in relation to the results of greyhound races to be held between August and September, 1955, bought some of these tickets from the appellants, the tickets having been printed long before. In December, 1955, the appellants' premises were raided and tickets were found in their possession. On informations against the appellants charging them (1) with printing tickets for use in a lottery promoted on E.'s premises contrary to section 22 (1) (*a*) of the Betting and Lotteries Act, 1934; (2) with having in their possession for the purpose of sale tickets in lotteries contrary to section 22 (1) (*b*), and (3) with distributing tickets in a lottery promoted at E.'s premises contrary to section 22 (1) (*b*), they were convicted. Quarter sessions dismissed their appeal. On a further appeal to the Divisional Court:—

*Held,* (1) that the words "prints any tickets for use in the lottery" in section 22 (1) (*a*) referred to a definite lottery, whereas when these tickets were printed they did not refer to any particular proposed lottery; (2) that there was no evidence that at the time when the tickets were found in the possession of the appellants that any lottery was proposed; (3) that there was no evidence that the appellants distributed tickets in connection with E.'s lottery. Accordingly the appellants were not guilty of the offences charged. [J. D. P.]

COMMENTARY. See [1956] Crim.L.R. 443. The case there discussed is now reversed and the analogy between lottery tickets which are printed with no particular lottery in view and a pack of playing cards seems to be a good one. Lottery tickets may be put to legal as well as illegal uses (see ss. 23 and 24 of the Betting and Lotteries Act, 1934, and the Small Lotteries and Gaming Act, 1956, ([1956] Crim.L.R. 639)) just as playing cards may.

If the tickets have been prepared for a particular lottery the burden of proving that that lottery was not an unlawful one, on a charge under section 22 of the Betting and Lotteries Act, 1934, is on the accused.

**Mens rea**—*Contempt.* See R. *v.* ODHAMS PRESS, p. 831, above.

**Pedlars**—*Travelling on foot, meaning of*

SAMPLE *v.* HULME; WALMSLEY *v.* HULME[9] (Q. B. Divisional Court: Lord Goddard C.J., Hilbery and Ashworth JJ.: October 4, 1956) ([1956] 1 W.L.R. 1319; [1956] 3 All E.R. 447n.).

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[9] For the appellants: *Richard Elwes Q.C., Philip Syrett* (instructed by Paisner & Co.). For the prosecutor: *Geoffrey Rippon* (instructed by Sharpe, Pritchard & Co. for A. James, Dewsbury).

Two salesmen, employed by a firm in Barnsley, travelled to Dewsbury with two other employees of the same firm in a motor-van in which were also carried goods which the salesmen intended to offer for sale or use as samples. They had no horse or beast bearing or drawing a burden. In Dewsbury the motor-van was left in Reform Street and the salesmen went separately and on foot from house to house in Reform Street carrying goods with them. Each of them effected a sale of some goods to an occupant of a house in Reform Street, the sale in each case taking place at the door of the house. Each of the salesmen was charged with having unlawfully acted as a pedlar within the meaning of the Pedlars Act, 1871, without having obtained a certificate, contrary to section 4 of the Act. The justices convicted the salesmen and fined them 10s. each and the salesmen appealed:—

*Held*, dismissing the appeal, that the salesmen, having left the motor-van, had travelled on foot from house to house, and that, therefore, they were pedlars within the meaning of section 3 despite the fact that they had travelled to Dewsbury by car. The word "travels" in section 3 could not be regarded as meaning travelling from town to town and it was impossible to say that a man who had arrived at a fixed point and there left his vehicle and proceeded to walk through the town was not travelling on foot.

[Miss J. F. Lamb, *Barrister-at-Law*.]

COMMENTARY. A pedlar, for the purposes of the Act, is one "who, without any horse or other beast bearing or drawing burden, travels and trades on foot and goes from town to town or to other men's houses," selling, etc. One who travels *with* a horse or other beast, etc., is a hawker and is required to have a licence under the Hawkers Act, 1888. A pedlar's certificate may be granted by the chief officer of police of the police district in which the applicant has resided for the previous month, on payment of a fee of five shillings.

**Road Traffic**—*Brakes—number of wheels to which brakes should apply*

LANGTON *v.* JOHNSON [10] (Q.B. Divisional Court: Lord Goddard C.J., Hilbery and Ashworth JJ.: October 4, 1956) ([1956] 1 W.L.R. 1322; [1956] 3 All E.R. 474).

The defendants were charged with unlawfully using a heavy motor-car which did not comply with reg. 39 (1) of the Motor Vehicles (Construction and Use) Regulations, 1955. They were also charged with failing to maintain the vehicle's hand-braking system in good and efficient working order contrary to regs. 76 and 104. The defendants pleaded Not Guilty to the first charge and Guilty to the second charge. The car was a six-wheeled lorry equipped with four front wheels running in pairs on two axles and two rear driving wheels. The foot brake operated by hydraulic means on all six wheels, and the hand brake, which was rod operated, worked only on the two rear wheels. The justices found the defendants Guilty on the first charge. The Recorder allowed the defendants' appeal against their conviction under reg. 39 (1). On the prosecutor's appeal:—

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[10] For the prosecutor: *J. I. E. Arnold* (instructed by Sharpe, Pritchard & Co. for John Heys, Sheffield). For the defendants: *D. T. Lloyd* (instructed by A. B. Thorneloe & Son, Sheffield).

*Held*, allowing the appeal, that in order to ascertain the number of wheels to which a brake should apply in accordance with reg. 39 (1), one calculated the number of wheels on the vehicle and divided by two, which in the present case meant that the handbrake should have applied to at least three wheels. One then had to ascertain that, in compliance with paragraph (7) of reg. 39, one did not include in that notional half more than one front wheel. As the defendants' hand-brake only applied to two wheels they were guilty of an offence.

*Per* Lord Goddard C.J. The appeal should be allowed although the prosecution, having obtained a conviction under reg. 76, it was not necessary to get one under reg. 39 as well.

[Miss C. J. Ellis, *Barrister-at-Law*.]

COMMENTARY. Counsel for the prosecution contended, and the court seems to have accepted, that the regulation required that the handbrake should apply to not less than three wheels of this vehicle, meaning two rear wheels and one front wheel. Such minimum compliance with the law would be, as the Lord Chief Justice said in argument, "most dangerous." A vehicle with six front wheels and two rear wheels (if such exists) would be incapable of complying with the law. The regulation seems to be unhappily drafted.

**Sentence**—*Fraudulent conversion.* See R. *v.* HUGHES, p. 835, above.

**Sentence**—*Imprisonment—sentence increased*

R. *v.* HIGGS [11] (Court of Criminal Appeal: Lord Goddard C.J., Hallett and Ashworth JJ.: October 22, 1956) (*The Times*, October 23, 1956).

H. pleaded guilty at the magistrates' court to larceny in a dwelling-house and larceny as a servant and was committed for sentence to quarter sessions where she was sentenced to three years' imprisonment, thirteen other offences being taken into consideration. H. was thirty-seven years of age and had four previous convictions for larceny, the last being in 1942. From October, 1955, onwards, H. obtained employment in a number of different places as a domestic servant where she stole jewellery amounting to about £4,000 worth in all. She appealed to the Court of Criminal Appeal against her sentence.

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[11] For the appellant: *A. J. D. McCowan* (instructed by the Registrar, Court of Criminal Appeal). The Crown was not represented.

*Held*, increasing the sentence, that the court regarded H.'s course of conduct as of a most serious and dangerous character. She deliberately robbed employer after employer so that in the end she had stolen £4,000 worth of jewelry. In the opinion of the court the sentence passed upon H. was too lenient and would, accordingly, be increased to one of five years' imprisonment. [H. P.]

COMMENTARY. On an appeal against sentence the court has power under the Criminal Appeal Act, 1907, s. 4 (3) to "pass such other sentence warranted in law by the verdict (whether more or less severe)" as they think ought to have been passed at the trial. The leave of the Court of Criminal Appeal itself is required to appeal against sentence (section 3 (*c*) of the Criminal Appeal Act, 1907) and it was formerly the practice of the court to warn applicants, where it seemed to the court that the sentence was not severe enough, that the sentence might be increased. This practice was ended by *R.* v. *McBain* (1946) 31 Cr.App.R. 113 where the court gave leave "for one reason only, in order that it might consider whether or not it should substantially increase his sentence."

Lord Goddard wrote in II *Journal of the Society of Public Teachers of Law*, (New Series) (1952) p. 2: "In point of fact very few sentences have been increased, I should think not more than thirty or forty, but whenever this is done it is always reported though dismissals or diminutions of sentence seldom are. Incidentally if leave to appeal is given with a view to increasing the sentence counsel is always allotted and of course frequently advises his client to drop his appeal."

### **Sentence**—*Sentence for offence not taken into consideration at previous trial*

R. *v.* WALTER[12] (Court of Criminal Appeal: Lord Goddard C.J., Hallett and Donovan JJ.: October 15, 1956).

W. was sentenced at Middlesex Quarter Sessions on June 1955, to eighteen months' imprisonment. He was released from prison in June, 1956, and was immediately rearrested on a charge of larceny committed prior to June 1955. He was brought before the same sessions where he pleaded guilty and was sentenced to three years' corrective training. He appealed against his sentence to the Court of Criminal Appeal.

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[12] The appellant appeared in person. The Crown was not represented.

*Held*, reducing the sentence, that there was some doubt as to whether W. deliberately failed to ask for the offence of larceny to be taken into consideration in June 1955. At all events, that offence was not taken into consideration although, had he asked for it to be taken into account, the sessions probably would have done so. It was because it is undesirable for a man to be charged with another offence immediately he is released from prison that the courts enabled offences to be taken into consideration. W. had been in custody for the present offence for over four months and that, in the circumstances, was sufficient. The sentence of corrective training would, therefore, be reduced to a term of imprisonment such as would enable W. to be discharged forthwith. [H. P.]

COMMENTARY. When an outstanding offence is taken into consideration, at the request of an accused person, in fixing his sentence, there is no conviction of the outstanding offence and, if the accused is subsequently indicted for it, he cannot plead *autrefois convict*: *R.* v. *Nicholson* (1947) 32 Cr.App.R. 98. Ordinarily the accused will, in practice, be safe from prosecution for offences which have been taken into consideration. It might, occasionally, however, be proper to bring a further charge for such an offence, *e.g.*, where the conviction on which he was sentenced is quashed on appeal.

### **Solicitors**—*Penalty for misconduct of non-professional character—appeal*

*Re* A SOLICITOR[13] (Q.B. Divisional Court: Lord Goddard C.J., Hilbery and Ashworth JJ.: October 4, 1956) ([1956] 1 W.L.R. 1312; [1956] 3 All E.R. 516).

A solicitor was found guilty on two charges of indecent assault and sentenced to three months' imprisonment against which he did not appeal. At a hearing before the Disciplinary Committee established under the Solicitors Acts, 1932 to 1941, at which the convictions were proved, the solicitor was found guilty of conduct unbefitting a solicitor and ordered to be removed from the Roll. On appeal against the penalty imposed:—

*Held*, reducing the penalty, that although it would take a very strong case for the court to interfere with a decision of the committee on a matter of professional misconduct, in a case of misconduct of a non-professional character the Divisional Court had to consider, in the same manner as the Court of Criminal Appeal when dealing with sentences, whether the penalty inflicted was in proportion to the offence committed. In all the circumstances of the present case, the court was of opinion that the penalty was too severe and should be reduced to two years' suspension.

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[13] For the appellant: *F. Elwyn Jones Q.C.* and *John Rutter* (instructed by Cartwright, Cunningham for Martin Evans & Son, Merthyr Tydfil). For the respondents: *J. R. Cumming-Bruce* (instructed by Hempsons).

[Miss C. J. Ellis, *Barrister-at-Law*.]

**Trial**—*Joint trial—direction to jury*

R. *v*. McAvoy[14] (Court of Criminal Appeal: Lord Goddard C.J., Hallett and Ashworth JJ.: October 22, 1956) (*The Times*, October 23, 1956).

M. was convicted with two other men at quarter sessions of shop-breaking and larceny and was sentenced to eighteen months' imprisonment. At the trial, the only evidence connecting M. with the offence was that a piece of sash cord was found in his possession which was said to resemble a sash cord taken from the place where the offence was committed. M. appealed to the Court of Criminal Appeal against his conviction on the ground that the Deputy Chairman failed to direct the jury that the case against each man ought to be considered separately and failed to put the defence case adequately to the jury.

*Held*, allowing the appeal, that the summing-up was completely defective. The Deputy Chairman did not warn the jury that they had to take the case of each man separately. On the evidence at the trial, there was some ground for saying that the sash cord found in M.'s possession was of a different type from that taken away, and that matter also was not put to the jury. The conviction could not, in those circumstances, stand and would, accordingly, be quashed. [H. P.]

Commentary. On a joint trial, certain evidence which is admissible against defendant A may be inadmissible against defendant B. The jury must then be instructed to ignore that evidence when considering the case of B. In practice it must be very difficult for the jury to do this, but the law is satisfied if the instruction is given. For a full discussion, see Glanville Williams, *The Proof of Guilt*, p. 183.

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[14] For the appellant: *P. Bruce* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *Cook Rogers* (instructed by W. H. Rogers, Carmarthen).

**Trial**—*Joint trial—evidence as to character—direction to jury*

R. *v.* SMITH [15] (Court of Criminal Appeal: Lord Goddard C.J., Hilbery and Ashworth JJ.: October 3, 1956).

S. was convicted at quarter sessions of receiving stolen property. He was indicted together with three others of whom H. was a man of good character and D. and T. had previous convictions. S. also had previous convictions. At the trial D. and T. put their characters in issue and were cross-examined about their previous convictions but S. did not. S. appealed to the Court of Criminal Appeal against his conviction on the main ground that the jury were misdirected as to S.'s character. The Deputy Chairman said in summing up: " H. is brought before you as a person of clean, upright and sound character . . . the other defendants are brought before you as persons who have been in trouble before."

*Held*, dismissing the appeal, that there was a slip on the part of the Deputy Chairman in directing the jury that S. was one of the defendants who had been in trouble before. However, no objection had been taken on this point at the trial and the jury had been very properly warned not to hold against any of the defendants the fact that they had been previously convicted. This court could not say that the Deputy Chairman's slip amounted to a misdirection and, in any event, it would be a case in which to apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907. Accordingly, the appeal would be dismissed. [H. P.]

COMMENTARY. When a judge makes an obvious mistake in his summing up counsel may interrupt to correct it: *R.* v. *Kams* (1910) 4 Cr.App.R. 8; *R.* v. *Butler* (1910) 4 Cr.App.R. 137; *R.* v. *Mowbray* (1912) 8 Cr.App.R. 8. It would seem unjust, however, that counsel's failure (or, *a fortiori,* the accused's own failure) to object should prejudice the accused on his appeal, as the dictum in this case suggests it might.

**Witness**—*Witness as to alibi unable to attend trial—no ground for appeal*

R. *v.* MUSIAL [16] (Court of Criminal Appeal: Hilbery, Ormerod and Ashworth JJ.: October 8, 1956) (*The Times*, October 9, 1956).

M. was convicted at Buckinghamshire County Sessions of storebreaking and larceny. He applied to the Court of Criminal Appeal for leave to appeal against his conviction on the ground that a witness for the defence had been unable to attend the trial. It was stated on behalf of M. that the defence was an alibi and that a witness who could support this alibi had been unable to attend the trial because he could not afford to pay the fare. The witness had not been subpoenaed. It was contended that in those circumstances the witness could not properly be regarded as "available" at the trial.

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[15] For the appellant: *G. D. Black* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *N. M. McElligott* (instructed by D. E. Morgan, Chelmsford).

[16] For the applicant: *Ian McCulloch* (instructed by Savory, Pryor & Blagden for Bliss, Sons & Covell, High Wycombe).

*Held*, dismissing the application, that on the facts there was no ground for an appeal. [H. P.]

COMMENTARY. The Court of Criminal Appeal has power to hear fresh evidence under section 9 of the Criminal Appeal Act, 1907, but the practice is to act on this power only in special circumstances, *i.e.*, where it is shown that the proposed witnesses were not available at the trial or that some point which could not have been foreseen arose at the trial on which the evidence would have been material. In *R.* v. *McGrath* [1949] 2 All E.R. 495 the court held that where it was dealing, not with an appeal, but with a case referred to it by the Home Secretary under section 19 (*a*) of the Criminal Appeal Act, 1907, and the Criminal Appeal Rules, 1908, it could receive fresh evidence even where these conditions were not fulfilled. More recently in *R.* v. *Sparkes* [1956] Crim.L.R. 411 the Attorney-General argued that, since a reference by the Home Secretary is, under the Act and the Rules, to be treated in all respects as an appeal, the rule of practice must be applied even on a reference. The court said, however, that it would not hold itself bound by the rule of practice if there were reason to think that to do so might lead to injustice or the appearance of injustice. Sparkes was then allowed to put his passport in evidence although he had failed to do so at his trial (when it was available) and although the court disbelieved his explanation which was that he forgot to produce it.

Musial seems to have produced stronger grounds for the reception of fresh evidence than did Sparkes. Surely it is just as important to avoid injustice or the appearance of injustice where the accused is applying for leave to appeal as where the case is referred to the court by the Home Secretary. It seems likely that Musial's evidence would have been received if his case had come before the court on a reference from the Home Secretary. Is not this liable to produce the result that the court in *Sparkes* thought "clearly undesirable"?—*i.e.*, "to encourage astute criminals dishonestly to by-pass the court after conviction in the hope that fresh evidence, genuine or otherwise, might be got before the court as the result of a petition to the Home Secretary, and a reference of the matter by him to the court." It is submitted with respect that the court should *never* apply the rule of practice where to do so might result in injustice or the appearance of injustice; and on the limited number of facts available in the present case, it might be thought that there was the appearance of injustice.

# *Acts and Orders*[*]

## Animals

FOWL PEST (INFECTED AREAS RESTRICTIONS) ORDER, 1956 (S.I. No. 1611): operative October 18, 1956. The Minister of Agriculture, Fisheries and Food is empowered to make an order respecting any area in the whole of Great Britain declaring that area to be infected with fowl pest, if he is satisfied that disease is prevalent in that area. When an area is the subject of such a declaration the provisions of this general Order will apply to that area.

The provisions include prohibitions against movements of poultry out of, into and within the area, except under licence and subject to certain conditions, and a prohibition against the holding of markets, fairs and sales of poultry, except under licence, and of exhibitions and shows in the area.

Ancillary provisions designed to prevent the introduction and spreading of fowl pest relate to the closing of particular footpaths and premises in the infected area, the regulation of the dress of persons sexing day-old chicks, cleansing and disinfection of vehicles used in an infected area for the conveyance of poultry or by egg-packing stations for the conveyance of eggs, and the disposal of manure and refuse from poultry slaughterhouses and of refuse from egg packing stations.

For penalties for contraventions, see section 79 of the Diseases of Animals Act, 1950.

## Civil Aviation

AIR NAVIGATION (FOURTH AMENDMENT) ORDER, 1956 (S.I. No. 1578): operative January 1, 1957. The Order of 1954 (S.I. No. 829; [1954] Crim.L.R. 640) is further amended. The new Order increases the minimum height at which aircraft may fly over a congested area of a town, city or settlement, and, *inter alia*, contains new provisions relating to the minimum height at which helicopters may fly over similar areas. There are special provisions for aircraft engaged in seed sowing and other agricultural operations and when landing or taking off.

For penalties for contraventions, see article 67 of the Order of 1954.

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[*] Prepared by F. Maurice Drake, Esq., Barrister-at-Law.

AIR NAVIGATION (MINIMUM HEIGHT OF HELICOPTERS) REGULATIONS, 1956 (S.I. No. 1641): operative January 1, 1957. Certain areas are prescribed over which a helicopter must not fly below such height as would enable it to alight clear of the area in the event of failure of a power unit. The areas prescribed are detailed areas in the vicinity of Kew Bridge, Brent Reservoir, Gospel Oak Station, Springfield Park, Bromley (Bow) Station (B.R.), Hither Green, Herne Hill Station (B.R.), Wimbledon Station (B.R.) and Castelnau Reservoir. The area of the River Thames is expressly excluded from the provisions of the Order.

For penalties for contravention, see article 67 of the Air Navigation Order, 1954 (S.I. No. 829).

## Defence Regulations

DEFENCE REGULATIONS (NO. 3) ORDER, 1956 (S.I. No. 1693): operative November 1, 1956. Regulations 55, 55AA, and 55AB of the Defence (General) Regulations, 1939, are amended and extended. Orders may be made to regulate or prohibit a number of activities concerning petroleum and petroleum products, including in particular the production, distribution and consumption of these commodities. Orders may also be made requiring undertakings concerned with petroleum or petroleum products to keep books and furnish information and to authorise the inspection of such undertakings. Provision is also made for price control to be imposed on petroleum and petroleum products.

## Hire-Purchase

CONTROL OF HIRING (NO. 2) (AMENDMENT) ORDER, 1956 (S.I. No. 1498): operative October 1, 1956. The Control of Hiring (No. 2) Order, 1956 (S.I. No. 1269; [1956] Crim.L.R. 705) is amended so as to permit the possession of goods under hiring agreements which do not comply with the provisions of the Order if the goods have been disposed of under authority of a licence granted by the Board of Trade.

For penalties for contraventions of the Order, see regulation 92 of the Defence (General) Regulations, 1939.

CONTROL OF HIRING (VEHICLES) ORDER, 1956 (S.I. No. 1499): operative October 1, 1956. The disposal and possession of certain vehicles under hiring agreements entered into after September 30, 1956, is controlled. The hiring agreement must be in writing, and before it is signed payment must be paid (a) in the case of an agreement for a definite period of less than nine months, of the whole of the rentals and charges payable under that or any related agreement; and (b) in any other case, of the whole of the rentals and charges payable during the first nine months of the agreement. Where a vehicle has been hired to a person for a definite period of not less than ninety days but less than nine months, the Order prohibits any further hiring of that vehicle to the same person during the next nine months for a definite period of less than nine months. Where a vehicle has been hired to a person for a definite period of more than thirty days and less than nine months, that vehicle may not be let on hire to any other hirer for such a period unless the person letting the vehicle on hire is satisfied, after inquiry, that this other hirer is not entering into the agreement in pursuance of some agreement or arrangement made with the original hirer. The Order does not apply to the disposal or possession of a vehicle where the hirer is an overseas visitor, or where the hirer is not to be in possession for more than thirty days, or, with certain exceptions, more than ninety days, in any period of twelve months. The Order applies to all mechanically propelled vehicles including mechanically propelled bicycles and tricycles, whether new or secondhand with certain exceptions, principally invalid and disabled persons' carriages, certain taxicabs, vehicles built to carry not less than twelve passengers, and goods vehicles rated to have a payload capacity of more than 30 cwt. The Board of Trade may grant licences excluding the operation of the Order in individual instances. The hiring agreements covered by this Order do not include a hire-purchase agreement falling within the provisions of article 7 of the Hire-Purchase and Credit Sale Agreements (Control) Order, 1956 (S.I. No. 180; see [1956] Crim.L.R. 279).

For penalties for contraventions, see regulation 92 of the Defence (General) Regulations, 1939.

### International Law

DIPLOMATIC IMMUNITIES RESTRICTION (AMENDMENT) ORDER, 1956 (S.I. No. 1579): operative on a date to be notified in the *London Gazette*. The personal immunities from suit or legal process which were withdrawn from persons connected with the envoy of the Union of Soviet Socialist Republics accredited to Her Majesty by a previous Order (S.I. 1956, No. 84) are now restored.

### London

LONDON QUARTER SESSIONS (APPEALS PANEL) ORDER, 1956 (S.I. No. 1584): operative October 9, 1956. The number of representatives to be nominated annually from amongst themselves by the justices acting in and for each petty sessional division of the county of London to serve on the panel of justices who may act as members of the court of quarter sessions for the county in relation to appeals is increased from one to two.

The following Order has been made prohibiting waiting: S.I. 1956, No. 1609 (Chalfont St. Peter).

The following order has been made respecting unilateral waiting: S.I. 1956, No. 1610 (Harrow).

The following Order has been made detailing prescribed routes: S.I. 1956, No. 1672 (St. Pancras).

### Police

POLICE (NO. 2) REGULATIONS, 1956 (S.I. No. 1556): operative October 8, 1956. The Police Regulations, 1952 (S.I. No. 1704) are amended so as to provide for new rates of overtime allowance to be calculated by reference to pay; for a minimum period of time off or a minimum allowance in lieu thereof in respect of duty performed on a public holiday or rest day, and for certain travelling time to be taken into account in calculating such time off or allowance; for increased rates of detective duty allowance; and for an increased issue of raincoats or mackintoshes for men and skirts for women.

### Revenue

EXCHANGE CONTROL (IMPORT AND EXPORT) (AMENDMENT) ORDER, 1956 (S.I. No. 1684): operative November 1, 1956. The Order of 1955 (S.I. No. 395) is replaced with further amendments. Travellers may now take out of the United Kingdom and Channel Islands the equivalent of £100 instead of £25 in foreign currency notes.

### Road Traffic

MOTOR VEHICLES (DRIVING LICENCES) (AMENDMENT) REGULATIONS, 1956 (S.I. No. 1602); operative October 19, 1956. The Regulations of 1950 (S.I. No. 333) are amended. The fee payable for the driving test for vehicles, other than the test for a mowing machine, an invalid carriage, a vehicle exempted from excise duty, or a vehicle controlled by a pedestrian, is increased from 10s. to £1.

### Trade and Industry

SUGAR ACT, 1956 (APPOINTED DAYS) ORDER, 1956 (S.I. No. 1637): operative October 23, 1956. Sections 7 (1), 8 (2) (4) and

(5), 11 (3) and 14 (1) of the Sugar Act, 1956 ([1956] Crim.L.R. 650), come into operation on January 1, 1957.

CENSUS OF PRODUCTION (1957) RETURNS AND EXEMPTED PERSONS) ORDER, 1956 (S.I. No. 1648): operative December 31, 1956. The matters are prescribed about which persons may be required to furnish returns for the purposes of the census of production which is to be taken in 1957. It exempts from the obligation to make such returns any person carrying on an undertaking in the field of production of coal, gas, electricity, oil-shale, crude or refined petroleum or shale oil products to the extent to which, with certain qualifications, the information which would be required by those returns is furnished to the Minister of Fuel and Power or to the Secretary of State under other provisions.

For penalties for failure to make returns or for giving false information, see section 4 of the Statistics of Trade Act, 1947.

REGISTRATION OF RESTRICTIVE TRADING AGREEMENTS REGULATIONS, 1956 (S.I. No. 1654): operative November 30, 1956. These regulations specify the procedure to be followed in furnishing particulars of agreements which become subject to registration under Part I of the Restrictive Trade Practices Act, 1956 ([1956] Crim. L.R. 710), by virtue of Orders made by the Board of Trade under section 9. Provisions are made relating to the contents and inspection of the registers of those agreements, which will be maintained in London, Edinburgh, and Belfast.

Regulations 1 to 3 specify the documents to be sent to the Registrar for the purposes of inclusion in the register, both upon the original registration and when any agreement is varied or determined; and special provision is made for cases in which a person or trade association enter into numerous agreements in a common form. In every case the person sending the documents is required to certify that the particulars given both of the terms of the agreement and the parties thereto are complete.

For penalties for contraventions, see sections 16 and 33 of the Restrictive Trade Practices Act, 1956 ([1956] Crim.L.R. 710).

# Practical Problems

*All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 3 Chancery Lane, London, W.C.2." The questions of subscribers only are answerable in the Review. All questions should be submitted in duplicate. The Publishers cannot accept any responsibility for the correctness of the replies.*

### 20. *Evidence of recent complaint*

A case of wilfully, openly, lewdly and obscenely exposing the person contrary to section 4 of the Vagrancy Act, 1824, was heard at a court. Evidence was given by two little girls, aged 9 and 12 years, followed by evidence of complaint made by one of the girls to her mother when she reached home after the incident. The girl's mother was called as a witness and gave evidence which included the words used by the girl. Most books state that such evidence may be given in sexual cases (a general classification), but as this offence is a summary one and the females are not victims as in rape, indecent assault, etc., would you inform me as to whether the procedure is considered correct. [L. H. G.]

#### ANSWER

Most books, *e.g.*, Archbold, 33rd ed., p. 395; Nokes, 2nd ed., p. 97, confine the doctrine of recent complaint to complaints by the victim in sexual matters, while conceding that there is some dubious authority for extending it to complaints by victims of non-sexual assaults. As far as is known there is no authority at all for extending the doctrine to evidence of persons who are not victims of the alleged crime, as is here the case. [D. W. E.]

### 21. *Promotion of lottery by licensee*

Bearing in mind section 141 of the Licensing Act, 1953, is the holder of a justices' licence entitled to promote a lottery as an incident of an entertainment on his premises providing the conditions set out in subsections (2) of sections 23 and 24 of the Betting and Lotteries Act, 1934, are complied with? [H. E. B.]

#### ANSWER

The holder of a justices' licence is prohibited by section 141 (1) of the Licensing Act, 1953, from suffering any gaming or unlawful game on his licensed premises. But he is nowhere specifically prohibited from promoting or conducting a lottery.

Provided, therefore, that—

(a) the lottery is one of the lawful kinds, and is conducted subject to the restrictions and conditions set out in sections 23 (2) and 24 (2) of the Betting and Lotteries Act, 1934, or section 1 of the Small Lotteries and Gaming Act, 1956 ([1956] Crim.L.R. 639), *and*

(b) it does not amount to gaming or an unlawful game,

the licensee may lawfully promote and conduct it.

Whether a particular lottery amounts to gaming is, of course, a question of fact for the jury (though whether a game is unlawful is a question of law for the judge); for example, in one case a sweepstake on football teams was held to be gaming (*Morris* v. *Baguley* (1937) *Brewing Trade Review Law Reports* 73). So, in any particular instance, in order to ascertain whether a licensee was committing an offence against section 141 (1) of the Licensing Act, 1953, in conducting a lottery, it would be necessary carefully to examine the details of lottery. [N. W.]

# *Books and Periodicals*

**Reviews:**

*Sexual Offenders and Social Punishment.* The evidence submitted on behalf of the Church of England Moral Welfare Council to the Departmental Committee on Homosexual Offences and Prostitution and other material relating thereto. Compiled and edited by Derrick Sherwin Bailey, PH.D. London: Church Information Board. 1956. 62 and (appendices) 56 pp. (6s. 6d. net.)

This book contains, in effect, the evidence submitted to the Departmental Committee on Homosexual Offences and Prostitution by the Church of England Moral Welfare Council. The major part, including Appendices I and II, is the work of the Council's Study Secretary, Dr. Bailey. The Foreword by the Bishop of St. Albans states the present position from which the study proceeds: "With prostitution, on the one hand, we see the law administered so mechanically and the fines and publicity accepted so lightly that justice is brought into contempt; while, on the other hand, with homosexual offences, the law seems sometimes to react to the other extreme, and men pay the price of blackmail or even suicide to avoid conviction and a heavy prison sentence." It is hoped that this statement does not indicate the belief in heavier fines for prostitutes, which may be called the last-ditch recommendation. Concentration on the penalty only assists in avoidance of consideration of the offence, which is generally regarded as most uncertain in definition today.

The book is in effect in two parts: the first on Homosexuals, the Law and Society; the second on Prostitution. The former is a humane study, concluding with a recommendation for a revision of the statute law on the subject. In general, public nuisance is suggested as the basis of the offence. Apart from this and certain other matters such as assault, homosexual acts between persons above the age of consent are not to be penalised. Seventeen years is suggested as the age of consent, so as to be in line with the Children and Young Persons Act, 1933. Two points are made with some force; it is urged that acts between females should be punished similarly to acts between males and a distinction is carefully drawn between homosexual acts and conduct. If this problem is to be seriously faced, and it may be that it is one of those better left untouched for fear of worse occurring, Dr. Bailey's reference to difficulties occasioned by want of an accurate and suitable terminology is important. The legal offences are most loosely described, though in practice the courts have more precisely defined them.

The part on Prostitution is shorter and less satisfactory. The emphasis on the view of the Church as regards chastity and the tendency to accept that this is less a female than a male problem distorts the picture. The submission agrees with many of the views of the Association for Moral and Social Hygiene and adopts the recommendations of that Association. They are of the opinion, therefore, that there should be no conviction of a prostitute except on the uncorroborated evidence of the person stated to have been annoyed or obstructed. It is surprising that Dr. Bailey makes no reference to the Report of the Street Offences Committee, 1928, Cmd. 3231.

The book will be of interest to those who wish to study the opinions of a large section of the Church of England. Appendix II on the Pastor and the Homosexual, which has not been previously published, is of particular interest in this connection.

T. E. James.

*Juvenile Offenders before the Courts.* By Max Grünhut. London: Oxford University Press. 1956. vi and 140 and (index) 3 pp. (21s. net.)

Local variation in the volume and structure of juvenile delinquency is an intriguing puzzle. In this book, which deserves serious study, Dr. Grünhut demonstrates that juvenile delinquency is not an isolated factor in the life of the community. All high delinquency areas consist of the most densely populated localities, where there is also evidence of criminal activities in general, a predominance of small incomes, and high infant mortality rates.

Dr. Grünhut discusses the practice of the police in certain areas to caution rather than prosecute a first offender. This certainly affects the juvenile delinquency statistics, yet does not always ultimately result in keeping delinquents out of the courts.

Treatment practice of juvenile courts in different parts of the country varies tremendously. By the use of carefully compiled statistical tables Dr. Grünhut shows that where magistrates are confronted with large numbers of juvenile delinquents they are inclined to dispose of considerable numbers of them by means of discharge and fines. Use of probation varies from 79 per cent. to 14 per cent. of juveniles before a court. These figures cannot help but cause grave disquiet. A greater degree of conformity by the courts in their pattern of treatment policy seems eminently desirable. This book, a mine of information, does not advocate any particular change. Yet it gives the reader a reforming zeal.

JEAN GRAHAM HALL.

*1,000,000 Delinquents.* By Benjamin Fine, Education Editor. The New York Times. London: Victor Gollancz, Ltd. 1956. 377 pp. (18s. net.)

The present annual rate of juvenile delinquency in the United States is 1,000,000. In gathering some impressive data, Dr. Fine ensures that others should be as forcibly struck as he was by this appalling figure. He has poured a plethora of information, opinion and statistical material into his book. Many of the colourful but authentic stories are told by the delinquents themselves.

Dr. Fine points out that statistics show not only an increase in the overall rate of delinquency, but also a spread through economic levels. The difference, he maintains, between delinquent behaviour and non-delinquent behaviour is one of quantity and degree rather than quality or kind. He gives no easy solution of this vast problem, but holds that preventive and curative methods employed in treating potential or actual delinquents are more effective than punitive methods.

This book is excellent as a first, deep plunge into a complex sphere. Its main recommendation is that it makes the reader long to undertake a further study of the problem in other, better documented and more sober books.

JEAN GRAHAM HALL.

*Birdman of Alcatraz.* The Story of Robert Stroud. By Thomas E. Gaddis. London: Victor Gollancz, Ltd. 1956. 254 pp. (16s. net.)

This tells the story of an American convict who, when in prison for murder, killed a guard. He was tried three times and sentenced to death but his sentence was commuted to one of life imprisonment. During his solitary confinement he made himself an expert on caged birds, this hobby being started by his healing of sparrows found in his exercise yard. Had he not been a man possessed of drive and energy he would not have become a world renowned expert on birds and their diseases and he would also not have run foul of the prison administration. As a result of this unpopularity he was moved to Alcatraz and deprived of his birds. There he studied law so that he could pursue his and is, I believe, still alive. This book is very interesting and well worth reading.

P. A.

## Books Received:

*The Bogeyman.* The exploits of Sergeant C. J. Chuck, Australia's most unpopular cop. By Vince Kelly. London: Angus & Robertson. 1956. xii and 209 pp. (15s. net.)

*Hypnotism and Crime.* By Heinz E. Hammerschlag. Translated by Professor John Cohen, Professor of Psychology, University of Manchester. London: Rider & Co. 1956. 137 and (references, bibliography and index) 9 pp. (13s. 6d. net.)

*Beds and Roses.* By Denys Roberts. London: Methuen & Co. Ltd. 1956. 231 pp. (12s. 6d. net.)

*The Queen's Courts.* By Peter Archer. London: Penguin Books. 1956. ix and 277 and (bibliography and index) 11 pp. (3s. 6d. net.)

*My Greatest Crime Story.* By Police Chiefs of the World. Edited by Kurt Singer. London: W. H. Allen. 1956. 224 pp. (13s. 6d. net.)

*Trial By Ordeal.* By Caryl Chessman. London: Longmans, Green & Co. 1956. 294 and (appendix) 15 pp. (18s. net.)

## Reader's Digest:

*Obtaining credit by fraud*: Section 13 of the Debtors Act, 1869: 72 *Law Quarterly Review* 548; 120 *Law Journal* 659; 100 *Solicitors' Journal* 759.

*Road traffic*: The difficulty of reconciling certain Divisional Court decisions concerning disqualification for insurance offences and the actual control of a moving vehicle: 72 *Law Quarterly Review* 516.

*Road traffic*: Causing death by dangerous driving: *Police Review*, October 5, 1956, p. 712.

*Road traffic*: Speed limits: 100 *Solicitors' Journal* 706, 739.

*Accessories*: On the facts stated in the article the question is raised whether a person charged with stealing was a principal or an accessory after the fact: 120 *Justice of the Peace* 643.

*Evidence*: Presumptions of fact and the onus of proof: 222 *Law Times* 216.

*Sentence*: Corrective training and preventive detention: 12 *The Magistrate* 107.

*Children and young persons*: New facts regarding juvenile delinquency: 12 *The Magistrate* 111.

*Children and young persons*: The police and youth (the Queen's Police Gold Medal essay): *Police Review*, October 19, 1956, p. 744.

*Justices' clerks*: The address of Lord Goddard C.J. to the annual conference of the Justices' Clerks Society is printed in full in *The Justices' Clerk*, October, 1956, at p. 4.

# Glossary

[Guide to pronunciation. Pronounce each syllable slowly as an ordinary English word, accenting the part in italics. Then repeat the whole phrase quickly but keep each sound distinct. Where at the end of a syllable the letter "r" appears in brackets (r) do not roll it. The letter "a" by itself is long, as in bay.]

*A fortiori*—so much the more so, with greater reason [a for-she-*or*-eye].

*Ab initio*—from the beginning [ab in-*ish*-ee-oh].

*Actus reus*—guilty act [*act*-us *ree*-us].

*Ad valorem*—in proportion to the estimated value of the goods [ad val-*or*-em].

*Ad vindictam publicam*—for public vengeance [ad vin-*dick*-tam *pub*lic-am].

*Amicus curiae*—literally, "friend of the court." This term is frequently applied to counsel who undertake to assist the court in a matter in which they are not engaged professionally [am-*eye*-cuss *cure*-ee-eye].

*Animus furandi*—intent to steal [*an*-imus fure-*and*-eye]. *Animo furandi*—with the intention of stealing [*an*-immo fure-*and*-eye].

*Animus poenitentiae*—an intention to repent [*an*-imus pea-knit-*tent*-she-eye].

*Audi alteram partem*—hear the other side [aw-die alter-am part-em].

*Bona vacantia*—goods without an apparent owner in which no one claims a property but the Crown [*bone*-e(r) vac-*ant*-ea(r)].

*De facto*—in fact, whether by right or not [dee *fact*-oh].

*De jure*—by right [dee jure-ee].

*Dictum, dicta*—a saying, sayings [*dick*-tum, *dick*-te(r)].

*Ejusdem generis*—of the same kind or nature. As a rule of construction where particular words are followed by general words, the latter are limited by the particular words [*ee*-juss-dem *gen*-er-iss].

*Ex parte*—on behalf of [ex *par*-tee].

*Ex post facto*—retrospectively [ex post *fact*-oh].

*In banc*—judges sitting in full court as distinguished from sittings of judges alone [in bank].

*In camera*—in court, the public being excluded or in a judge's private room [in camera].

*In extenso*—in full [in ex-*ten*-so].

*In personam*—an act, proceeding or right done or directed against or with reference to a specific person [in per-so-nam].

*In rem*—an act, proceeding or right available against the world at large [in rem].

*In specie*—in a particular form [in spee-she].

*Inter alia*—among other things [*in*-ter *a*-lea(r)].

*Ipso facto*—by the very fact [*ip*-so *fact*-oh].

*Loc. cit.* (*loco citato*)—in the passage already quoted [lock sit].

*Locus classicus*—best known or most authoritative passage on a subject [*lock*-us classic-us].

*Locus in quo*—the place in which [*lock*-us in kwo].

*Lucri causa*—for the sake of profit [lieu-cry cows-ah].

*Lucrum*—profit, gain [lieu-crumb].

*Mala fide*—in bad faith [ma-le(r) *fie*-dee].

*Mens rea*—guilty mind [men's rea(r)].

*Nolle prosequi*—an act of the Attorney-General to stay proceedings [nolly pross-ek-wee].

*Obiter*—by the way, in passing [*oh*-bitter].

*Obiter dictum*—a mere saying by the way, a chance remark, which is not binding upon future courts [*oh*-bitter *dick*-tum].

*Per*—by [per].

*Per curiam*—by the court [per *cure*-ee-am].

*Per incuriam*—without proper consideration of all relevant matters; thus a decision is not a binding precedent if the court's attention has not been drawn to the relevant authorities [per in-*cure*-ee-am].

*Per os*—by the mouth [per os].

*Per quod servitium amisit*—literally, "whereby he lost his services." An action for damages lies against any person who commits a tortious act against the servant of another whereby the master is deprived of his services [per quod serve-*it*-ee-um a-my-sit].

*Prima facie*—at first sight, on the face of it [pry-me(r) *fay*-she].

*Qua*—as, in the capacity of [kwa-a].

*Quaere*—query [query].

*Ratio decidendi, rationes decidendi*—the reason or ground of a judicial decision [*ray*-she-oh, *ray*-she-oh-nees *dee*-sid-end-eye].

*Sine die*—without naming a day [*sigh*-knee *die*-ee].

*Stare decisis*—to abide by authorities or cases already adjudicated upon [*stare*-ee de-*syce*-iss].

*Ultra vires*—literally, "beyond the power." An act in excess of the authority conferred by law and therefore invalid [*ull*-tra(r) *vie*-rees].

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*Ad valorem*—in proportion to estimated value of the goods [ad val-*or*-em].

*Bona vacantia*—goods without an apparent owner in which no one claims a property but the Crown [*bone*-e(r) vac-*ant*-ea(r)].

*In camera*—in court, the public being excluded, or in the judge's private room [in *cam*era].

*Mens rea*—guilty mind [men's rea(r)].

*Ultra vires*—literally " beyond the power." An act in excess of the authority conferred by law and therefore invalid (Osborn—*The Concise Law Dictionary*) [*ull*-tra(r) *vie*-rees].

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*Amicus curiae*—literally, " a friend of the court." This term is frequently applied to counsel who undertake to assist the court in a matter in which they are not engaged professionally [am-*eye*-cuss *cure*-ee-eye].

*Animus furandi*—intent to steal [*an*-imus fure-*and*-eye].

*In camera*—in court, the public being excluded, or in the judge's private room [in *cam*era].

*Inter alia*—among other things [*in*-ter *a*-lea(r)].

*Mens rea*—guilty mind [men's rea(r)].

*Prima facie*—at first sight, on the face of it [pry-me(r) *fay*-she].

*Quaere*—query [query].

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*Animus furandi*—intent to steal [*an*-imus fure-*and*-eye].
*De facto*—in fact, whether by right or not [dee *fact*-oh].
*De jure*—by right [dee jure-ee].
*Ipso facto*—by the very fact [*ip*-so *fact*-oh].
*Locus in quo*—the place in which [*lock*-us in kwo].
*Nolle prosequi*—an act of the Attorney-General to stay proceedings [nolly pross-ek-wee].
*Obiter*—by the way, in passing [*oh*-bitter].
*Prima facie*—at first sight, on the face of it [pry-me(r) *fay*-she].

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*Audi alteram partem*—hear the other side [aw-die alter-am part-em].

*Per curiam*—by the court [per *cure*-ee-am].

*Sine die*—without naming a day, indefinitely [*sigh*-knee *die*-ee].

*Ultra vires*—literally "beyond the power." An act in excess of the authority conferred by law and therefore invalid [*ull*-tra(r) *vie*-rees].

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# Glossary

[Guide to pronunciation. Pronounce each syllable slowly as an ordinary English word, accenting the part in italics. Then repeat the whole phrase quickly but keep each sound distinct. Where at the end of a syllable the letter " r " appears in brackets (r) do not roll it. The letter " a " by itself is long, as in bay.]

*Actus reus*—guilty act [*act*-us *ree*-us].

*Bona vacantia*—goods without an apparent owner in which no one claims a property but the Crown [*bone*-e(r) vac-*ant*-ea(r)].

*Ipso facto*—by the very fact [*ip*-so *fact*-oh].

*Loc. cit.* (*loco citato*)—in the passage already quoted [lock sit].

*Locus classicus*—best known or most authoritative passage on a subject [*lock*-us classic-us].

*Mens rea*—guilty mind [men's rea(r)].

*Nolle prosequi*—an act of the Attorney-General to stay proceedings [nolly pross-ek-wee].

*Obiter*—by the way, in passing [*oh*-bitter].

*Per os*—by the mouth [per os].

*Quaere*—query [query].

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# Glossary

[Guide to pronunciation. Pronounce each syllable slowly as an ordinary English word, accenting the part in italics. Then repeat the whole phrase quickly but keep each sound distinct. Where at the end of a syllable the letter " r " appears in brackets (r) do not roll it. The letter " a " by itself is long, as in bay.]

*Ab initio*—from the beginning [ab in-*ish*-ee-oh].

*Animus furandi*—intent to steal [*an*-imus fure-*and*-eye].

*Dictum, dicta*—a saying, sayings [*dick*-tum, *dick*-te(r)].

*Ejusdem generis*—of the same kind or nature. As a rule of construction where particular words are followed by general words, the latter are limited by the particular words [*ee*-juss-dem *gen*-er-iss].

*In banc*—judges sitting in full court as distinguished from sittings of judges alone [in bank].

*Inter alia*—among other things [in*ter* *a*-lee-ah].

*Ipso facto*—by the very fact [*ip*-so *fact*-oh].

*Mens rea*—guilty mind [men's rea(r)].

*Per curiam*—by the court [per *cure*-ee-am].

*Per quod servitium amisit*—literally, "whereby he lost his services." An action for damages lies against any person who commits a tortious act against the servant of another, whereby the master is deprived of his services [per quod serve-*it*-ee-um a-*my*-sit].

*Quaere*—query [query].

*Ratio decidendi, rationes decidendi*—the reason or ground of a judicial decision [*ray*-she-oh, *ray*-she-oh-nees *dee*-sid-end-eye].

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# Glossary

[Guide to pronunciation. Pronounce each syllable slowly as an ordinary English word, accenting the part in italics. Then repeat the whole phrase quickly but keep each sound distinct. Where at the end of a syllable the letter “r” appears in brackets (r) do not roll it. The letter “a” by tiself is long, as in bay.]

*Actus reus*—guilty act [*act*-us *ree*-us].

*Ex post facto*—retrospectively [ex post *fact*-oh].

*Inter alia*—among other things [in*ter* *a*-lee-ah].

*Mala fide*—in bad faith [ma-le(r) *fie*-dee].

*Mens rea*—guilty mind [men's rea(r)].

*Sine die*—without naming a day, indefinitely [*sigh*-knee *die*-ee].

*Stare decisis*—to abide by authorities or cases already adjudicated upon [*stare*-ee de-*syce*-iss].

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